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Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM MAY, TRUSTEE, AND IN HIS RIGHT, AND AMY MAY, HIS WIFE,

Appellants,

v.

SARAH MARIA MAY, ALICE BEAVOR WEBB, AND J. BEAVOR WEBB, HER HUSBAND, ET AL.,

Appellees

BRIEF FOR APPELLANTS.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
For Appellants.

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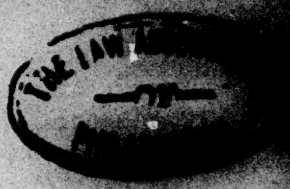

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 269.

WILLIAM MAY, TRUSTEE OF JOHN FREDERICK MAY, DECEASED, AND IN HIS OWN RIGHT, AND AMY MAY, HIS WIFE,
Appellants,

v.

SARAH MARIA MAY, ALICE BEAVOR WEBB, AND J. BEAVOR WEBB, HER HUSBAND, EDITH SYBIL RANDOLPH, ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The original bill was filed in the Supreme Court of the District of Columbia, May 2, 1892, by the appellant, William May, as one of the trustees appointed under the will of his father, and as one of the beneficiaries named therein, against Sarah Maria May, the other trustee named in the will, and against all the other beneficiaries named therein, to obtain a judicial construction of said will, and to obtain instructions as to the management and disposition of the trust estate. (Printed record, pages 1–4.)

John Frederick May died in the District of Columbia on

the 1st of May, 1891, seized and possessed of a large amount of property, most of it being realty, situated in the city of Washington, and a house in the city of New York, leaving a last will and two codicils thereto, which will and codicils were duly admitted to probate in said District on the 19th of June, 1891. (R. 2.) As the *second* codicil (R. 9) merely requests the executrix to pay certain debts of the testator, it plays no part upon this appeal, and we are only concerned with the will and first codicil, which are set forth at pages 4–8 of the Record.

By the first clause of the *will* the testator devises and bequeaths to his wife, Sarah Maria May, and her heirs his entire state, real and personal, *in trust* for the purposes declared in the will. (R. 4.)

By the second clause one-third of the net annual income of the estate is given by the testator to his wife for life, and one-third of the personal estate absolutely. In addition, the testator devises to his wife, during her life, the house on G street, in the city of Washington, in which they were then living. (R. 4.)

The third clause is as follows: "As it is my wish to keep my estate intact and undivided, in the belief of its increase in value, and especially to ensure unto my wife and children a certain income during their lives, I will and direct that no division of it shall be made while any of my children are living, and that the rents, issues, and profits of it, with the exception of the thirds of my wife, shall be applied to the payments of all just debts I may owe, at the time of my death, and especially to the cancelling of any incumbrance or mortgage that may then exist, on any part of my estate, and when the said debts and incumbrances have been fully paid and cancelled, I will and direct that the rents, profits, and issues shall be equally divided and paid unto my children, subject to the provisions herein made, with respect to the income of my said estate." (R. 5.)

By the fourth clause the testator directs that nothing contained in the will shall prevent the sale by his trustee of any part of the estate, provided such sale is greatly for the benefit of his heirs; and, in the event of any part of the estate being thus sold, the proceeds of such sale shall be reinvested in improved real estate in the city of Washington, and if this cannot be conveniently done such proceeds shall be invested in loan upon good real estate in said city; and he gives power to his trustee to remortgage, or put in trust, such parts of his estate which, at the time of his death, may be mortgaged, should it become necessary to do so, after the mortgages, or trusts, then existing shall have expired on said parts of his real estate, but such power shall extend no further than to the parts which, at the time aforesaid, may be mortgaged, and shall only be used in the event of the inability of his trustee to pay or cancel the said mortgages if required by the mortgagees so to do. (R. 5.)

By the fifth clause the testator directs that should any of his children "have married and died, and left issue," then the share of the rents, profits, and issues of said deceased child shall be used and appropriated by the trustee for the support and education of such issue until the attainment of his, her, or their lawful age. (R. 5.)

By the sixth clause the testator gives to his wife and children certain specific articles of personal property. (R. 6.)

By the seventh clause he directs that his wife shall not be required to give bond as his trustee as aforesaid. (R. 6.)

By the eighth clause he appoints his wife the *executrix* of his will and requests that no bond be required from her. (R. 6.)

The above are, in substance, *all the provisions contained in the will.*

The first codicil is dated March 27, 1891, more than a year after the date of the will. By its terms the testator

appoints his son William May *co-trustee* with his wife, "*my said son and my wife to have and exercise the powers and authority in my said will mentioned and created, except as hereinafter otherwise directed.*" The codicil then proceeds as follows:

"It is my further wish and I hereby will and direct that my said son William May shall take charge of my real estate (except my present dwelling-house, which shall be and remain in the exclusive charge of my wife during her life) and care for and manage the same for the best interests of my said estate, and in accordance with the terms of my said will, and he shall collect the rents and income of my said real estate and pay the lawful taxes and assessments, and other expenses thereon, and shall keep the same in good repair. It is my will and I so direct that the taxes, insurances, and repairs on my said dwelling-house shall be paid out of the general income of my other real estate.

"For the said service of my son, William May, in caring for and managing said estate and for collecting the rents and paying the taxes and assessments, and other services, as hereinbefore directed, he shall and may retain from money so collected, as his compensation, a commission equal to five per centum of the amount of money by him collected from said estate, and the said William May shall render to my said wife full and true accounts of the rents by him collected, and of the disbursements by him made in the execution of this trust, such accounts to be rendered each and every month, and shall be accompanied by the vouchers for such disbursements. After the death of my wife, said accounts shall be rendered to my other heirs. It is my will that no commissions shall be paid to my wife as a trustee.

"I hereby further will and direct that *for good and sufficient cause* my other heirs, with the concurrence of my wife, if she be living, shall have, and they are hereby given the power, by their unanimous resolution, to remove my said son, William May, from his office, as such trustee, and to appoint another person in his stead.

"It is my wish that neither of my said trustees shall be required to give a bond or other security, in reference to the execution of the trusts created by my said will or this codicil." (R. 7, 8.)

The main object of the bill filed by William May was to obtain a judicial construction of the above-recited *third clause* of the will, to obtain instructions as to the manner of administering the trusts, and to have determined whether Sarah Maria May was entitled to receive, under the will, one full third of the income arising from and yielded by the estate *without allowing for or deducting the interest on the mortgage indebtedness*, which one full third she was then claiming and receiving, and which mortgage indebtedness on the estate at the time of the filing of the bill amounted to about $32,000, and the interest thereon to about $1,600 per annum.

All the defendants severally answered the bill. (R. 11–15, 15–19, 19–23, 24–27, 68–71.) The answers are essentially alike. One is a type of all. They contain the same averments. The answer of Sarah Maria May admits that she is sole executrix, and also one of the trustees, under said will and codicils, and that as executrix she is duly administering the personal estate. She says there are other clauses in the will and codicils bearing upon the disposition of the testator's real estate besides those set forth in the complainant's bill, as, for instance, the provision for testator's grandchildren in the 5th paragraph of the will, and others, and that these grandchildren are necessary parties to the suit, as is also the wife of the complainant. As to the construction sought to be put upon the will by the complainant, she says she is advised it is not material for her to answer. She admits that she has claimed, and is receiving, one-third of the net income from rents after deducting taxes, insurance, and repairs, *but before deducting*

annual interest on mortgage debts, and that this is according to the intention of the testator as expressed in his will, *as she is advised and believes.* She says the employment of an expert accountant, as alleged in the 11th paragraph of the bill, was rendered necessary in consequence of the misbehavior of the complainant in his manner of conducting the business of the estate; that he was so domineering and disagreeable in his conduct and manner towards her in regard to the business of the estate that personal interviews and transactions with him on the subject became intolerable; and that the employment of said accountant was further rendered necessary by the confusion, errors, duplicate charges, and erroneous credits in the complainant's accounts as rendered to her. She further says she was compelled to employ said accountant because the complainant's monthly accounts up to January 1, 1892, were rendered by him upon an erroneous basis, and the accounts were inaccurate and contained improper charges and credits to the disadvantage of herself and the estate. She further says that she and the five children of herself and the testator, other than the complainant, are united and harmonious in all their views in regard to the estate, and that the only discord and want of harmony have been caused by the misconduct, erratic opinions, and overbearing disposition of the complainant. (R. 11–15.)

On the 28th of September, 1892, a replication was filed to all the answers. (R. 29.)

On the 29th of December, 1892, after the cause was at issue, a paper writing dated November 25, 1892, signed by all the defendants except J. Beavor Webb and Frederick May, but professing to be signed by Frederick May by his attorney in fact, and styled a "deed, declaration, and resolution," was served on William May. (R. 34–36.) This paper recites that the testator, in the first codicil to his will,

directed that *for good and sufficient cause* testator's heirs, with the concurrence of his widow, were given the power by their unanimous resolution to remove William May from his office as trustee, and to appoint another person in his stead, and that good and sufficient cause exists for the exercise of such power of removal and substitution. It then sets forth the following reasons for such removal:

1. The monthly accounts of rents collected and disbursements made by him as co-trustee have not been "full and true accounts," and in many instances have not been accompanied by vouchers as required by said first codicil.

2. In the first account rendered by him to Sarah M. May, in May, 1891, he wrongly claimed that the estate owed him $79.50, when in fact he owed the estate not less than $1,000, the difference being a check of $1,174.60, for which he had credit in settling his accounts with the testator in his lifetime, but claimed credit a second time in said account rendered to Sarah M. May.

3. He has ever since refused to exhibit to said Sarah M. May his bank book and check book covering the time when this duplicate charge was made.

4. He has altered papers presented as vouchers so as to claim credits to which he was not entitled, and has made excessive, duplicated and improper charges against the estate.

5. He claims to have paid and incurred bills aggregating about $5,000 in remodelling house No. 629 E street northwest (belonging to the estate) which is a grossly excessive amount for the work done, and he has made no proper statement of such expenditures.

6. By his intolerably domineering and disagreeable manner in discussing the affairs of the trust with his co-trustee, displays of anger when questioned, and attempts to browbeat legitimate opposition and criticism, he has compelled said co-trustee to decline any direct communication with

him upon business matters, and she is obliged to employ an expert accountant to examine and report upon the monthly accounts of said William May, and act as her representative in relation to the affairs of the trust.

7. He has absented himself from the District of Columbia during unreasonable periods of time.

The paper then states that the signers have unanimously resolved, and do hereby resolve, *that William May be, and he is hereby, removed from his office as co-trustee, and that William H. Dennis has been appointed in his stead.* (R. 36.)

On the 7th of January, 1893, Amy May, wife of said William May, was, by order of the court, made a party complainant in the cause (R. 39), and on the same day, by order of the court, William Merritt Wright and Julian May Wright, infant children of the defendant Caroline K. Wright; Adelaide D. Randolph and Arthur Bertram Randolph, infant children of the defendant Edith S. Randolph, and Louise Genesta Beavor-Webb, infant child of the defendants Alice and J. Beavor-Webb, were made defendants in the cause. (R. 40.)

On the 21st of January, 1893, the defendant Sarah Maria May was also made a party defendant in her capacity as executrix of the last will of John F. May, deceased, and as trustee thereunder; and leave was granted to the defendants, or any of them, *to file a cross-bill against the complainant.* (R. 41.)

On the 7th of March, 1893, all the *original* defendants, except J. Beavor Webb, filed a cross-bill against said William May. (R. 48–51.) It recites that said "deed, declaration, and resolution," above set forth, was handed to William May December 29, 1892, together with a letter from the counsel of the plaintiffs in the cross-bill, and one from said William H. Dennis, notifying and requiring William May to surrender possession of the real estate and other

property in his hands as co-trustee unto said Dennis. The cross-bill then charges William May with misfeasance as trustee, as appears from a series of acts beginning at the death of the testator and continuing to and including his most recent monthly account, that for January, 1893, in which account he has taken almost the whole net income for the month to pay a retaining fee of $1,000 to his personal counsel; that he is unfit for a place of such extensive trust and confidence; that he has an exaggerated idea of his powers and importance; that his opinions and acts are erratic, variable, and uncertain; and that his accounts can never be relied on for fairness or correctness. The charges against William May contained in the answers to the original bill, and in said "deed, declaration, and resolution," are then made a part of the cross-bill. It then charges that William May has been getting into his hands without right $250 per month as rent for a house known as No. 21 West Nineteenth street, in New York city, though said house belonged to his mother, said Sarah M. May; that, without right, he is still claiming to act as co-trustee; that he is insolvent, and has given no security as trustee; and that he holds the books, papers, and other property of the estate. The cross-bill then prays for a perpetual injunction commanding William May to surrender to said William H. Dennis as co-trustee full possession of the real estate, to turn over to said Dennis all moneys, papers, and books pertaining to the trust, and to refrain from interfering with his successor in the performance of the trust. (R. 48–51.)

On the 4th of April, 1893, William May filed his answer to the cross-bill. (R. 59–65.) He says it is untrue that he paid a retaining fee of $1,000 to his *personal counsel*. On the contrary, he employed counsel, *as trustee*, to institute and conduct this cause; and as to the controversy growing out of the attempt to remove him from his office as trustee,

"It is further adjudged, ordered, and decreed that said William May be, and he is hereby, perpetually enjoined and restrained from hereafter acting, or claiming or attempting to act, as co-trustee under said will and codicils, and from interfering in any manner with or molesting the possession and management of the trust property by said co-trustees, Sarah M. May and William H. Dennis.

"It is further adjudged, ordered, and decreed that said Willim May render a full and final account of all and singular his receipts and disbursements as co-trustee under said will and codicils, with the vouchers evidencing such disbursements, up to the time his authority in accordance with this decree ceases of such co-trustee, said account to be stated before the auditor of this court.

"It is further adjudged, ordered, and decreed that said Sarah Maria May is entitled to receive during her life for her own use (in addition to the other provisions for her benefit in said will and codicils) one-third of the net income from the rents, issues, and profits of the estate, after deducting taxes, insurance, and repairs, and without her share of said income being diminished by deducting any amounts of interest heretofore paid or hereafter to be paid upon the just debts of the testator, or on any mortgages or incumbrances on said estate, and in the accounting under this decree such undiminished one-third of the net income from rents, issues and profits shall be stated by the auditor as the amount properly allowable to said widow, Sarah Maria May, on account of such bequest to her of one-third of said income."

From this decree an appeal was taken by William May and his wife to the Court of Appeals of the District of Columbia. (R. 371.)

The appeal came on to be heard in the Court of Appeals on the 6th of February, 1895 (R. 385), and on the 5th of March, 1895, a decree was rendered affirming said decree of the Supreme Court of the District of Columbia, with costs (R. 394), from which decree of affirmance an appeal was taken to this court. (R. 395.)

Assignment of Errors.

The court erred:

1. In affirming the decree of the Supreme Court of the District of Columbia, with costs.

2. In adjudging that the heirs of the testator, other than said William May, with the concurrence of Sarah Maria May, proceeded rightfully, and within the power conferred by the first codicil, in removing, by their unanimous resolution, William May from his office as trustee, and in appointing William H. Dennis in his stead.

3. In adjudging that there existed good and sufficient cause why William May ought to have been removed.

4. In adjudging that William May surrender possession and control of the trust property in his hands unto Sarah Maria May, trustee, and the substituted co-trustee.

5. In adjudging that William May deliver to the co-trustees aforesaid books, papers, and property pertaining to the execution of the trust, and pay over and transfer to them the moneys in the hands of William May as funds of the trust estate.

6. In adjudging that all the powers and duties originally conferred upon said William May by said will and codicils shall be vested in said Sarah Maria May, trustee, and William H. Dennis, co-trustee.

7. In perpetually enjoining William May from acting as co-trustee under said will and codicils, or from interfering with the possession and management of the trust property.

8. In adjudging that William May render a full and final account of all and singular his receipts and disbursements as co-trustee.

9. In adjudging that Sarah Maria May is entitled to receive, during her life, for her own use, one-third of the net income from the rents, issues, and profits of the estate after

deducting taxes, insurance, and repairs, and without her share of said income being diminished by deducting any amounts of interest heretofore paid or hereafter to be paid upon the just debts of the testator, or any mortgages or incumbrances on said estate.

10. In adjudging that William May execute and deliver a deed and release conveying to Sarah Maria May and William H. Dennis as co-trustees all right, title, and interest in and to the trusts and powers formerly vested in William May as co-trustee; and unless William May shall duly execute and deliver such deed and release, then the decree shall stand and operate as such deed and release.

11. In not adjudging that William May was authorized as trustee to pay out of the trust moneys in his hands necessary counsel fees for conducting the suit to obtain a judicial construction of the will, and to defend his title to the trusteeship when unjustly assailed by his co-trustee and the beneficiaries under the trust.

12. In not construing the will, especially the third clause thereof, and in not determining in what manner the estate shall be distributed among the beneficiaries who shall be declared entitled to the same, as prayed for in said original bill.

13. In not construing the will in reference to the duration, nature, and extent of the trust sought to be created; and also as to the effect in law of the failure to devise and dispose of the principal estate after the termination of the trust.

14. In not adjudging that all the necessary costs and expenses incurred by William May as trustee, including necessary counsel fees, arising in conducting the original suit and in defending the cross-bill, both in the Supreme Court of the District and in the Court of Appeals, should be paid out of the estate.

15. In adjudging that the heirs of the testator, other than William May, with the concurrence of Sarah M. May, proceeded rightfully in removing, by their unanimous resolution, William May from the trusteeship, whereas the resolution of November 25, 1892, was not signed by Frederick May or by his authority.

THE FACTS AND ARGUMENT.

The original bill was filed to obtain a construction of the will, and the directions of the court as to the manner in which the estate should be administered and distributed among the beneficiaries. The cross-bill was filed to obtain a perpetual injunction commanding William May to surrender to William H. Dennis as substituted trustee possession of the real estate, and to turn over to him all money, books, papers, and other property pertaining to the trust, and to compel him to settle a final account as co-trustee, and to pay over the balance to the substituted trustee.

We shall first consider the questions arising upon the cross-bill, and then the questions as to the construction of the will.

Whenever in this brief the testimony of a witness for either side is *quoted* the *exact language* of the witness is given, in so far as it could be done by reducing the testimony, which was taken down by questions and answers, to a narrative form. So far as we have professed to state the evidence, we have endeavored to state it with the utmost exactness and fairness.

AS TO THE CROSS-BILL.

I.

Every one of the charges of fraud, irregularity and neglect of duty against William May, set forth in the cross-bill, and

in the answers to the original bill, and in said "deed, declaration and resolution," which are made a part of the cross-bill, is untrue. *Not one of these charges has been established by the evidence.* The plaintiffs in the cross-bill assumed a heavy responsibility when they thus assailed the reputation and character of an honest and trustworthy man. The motives that prompted them will be unfolded further on in this brief.

Mr. Justice Hagner, before whom the case was tried in the Supreme Court of the District of Columbia, and who closely scrutinized every detail of the voluminous testimony, in delivering his decision, says:

"Of course, if the reiterated charges of improper conduct and neglect of duty in the administration of the trust brought by the other beneficiaries are true, there could be no hesitation as to his removal on those grounds; but so far from deciding against William May on all these serious charges, *it seems to me they may be explainable, and I think in a great many respects his management of the property has been decidedly commendable,*" (R. 380) and he rests his decision on the ground of the discordant relations between William May on one side and his co-trustee and all the beneficiaries of the trust, except himself, on the other side.

The Court of Appeals, in its opinion, completely ignores the charges of fraud, irregularity, and neglect of duty, and rests its decision on the ground that *even if the conduct of the trustee is otherwise unobjectionable,* yet the existence of "dissension" between the trustee and his co-trustee and the beneficiaries is sufficient to justify the trustee's removal. It says:

"It is satisfactory to feel, in the view which we take of this case, that it is wholly unnecessary for us to weigh the

conflicting statements of the parties, *or to determine any question of misconduct or moral delinquency on either side*, if such there be, and that we may determine the controversy, so far as it is incumbent on us to determine it, without reference to the mutual recriminations of the parties. (R. 390.)

"But was their action in fact an abuse of their power (*i. e.*, the action of the widow and beneficiaries in removing William May from the trusteeship), instead of a legitimate exercise of it? Was there good and sufficient cause for the removal of the trustee? Or was the finding by the defendants of such cause a mere pretense for the exercise of arbitrary and unreasonable authority? As we have stated, we will not enter into any investigation of the causes of dissension between the parties, or of the reasonableness or unreasonableness of their respective positions. That there is dissension, bitter and uncompromising, is beyond question. That such dissension precludes intercourse between the parties is their mutual declaration. If there be no intercourse between them, no communication of views, their joint execution of their trust is an impossibility. The due execution of the trust requires concurrence of action and consultation preliminary to action. The trusts are all active trusts, in which the judgment and discretion of both trustees are necessary for their proper execution; and we must suppose that it was to secure this concurrence of action, and to prevent the dissension that would militate against it, that the testator created the power of removal which he called into existence in his codicil. *It is not necessary that there should be actual misconduct or moral delinquency on the part of the trustee to justify his removal;* any failure, disability, or inability to perform the trust would be sufficient. And it is also true that mere disagreements do not constitute sufficient cause for the removal of a trustee, for otherwise the purposes of an appointment might sometimes be frustrated. (1 Perry on Trusts, 276; Forster *v.* Davies (4), De G. F. & J., 139.) But, unquestionably, the evidence of dissension, deep-seated and irreconcilable, not superinduced for the mere purpose of getting rid of a trustee who is in the faithful performance of his duty, but dissension such as

imperils the due and proper execution of the trust, is sufficient to justify the removal of a trustee, *even if otherwise the conduct of the trustee is unobjectionable.*" (R. 391, 392.)

It thus appears that the Court of Appeals ignored the charges of fraud, irregularity in the accounts, and neglect of duty, and, in our opinion, it omitted all reference to the charges simply because they were not sustained by the evidence. We have quoted the above extract from the court's opinion simply to show the *ground* of the opinion, and for that purpose only. Not one of the principles of law laid down in the extract is *applicable to the facts of this case*, except the doctrine drawn from Terry on Trusts and the English chancery that "*mere disagreements do not constitute sufficient cause for the removal of a trustee.*"

The court, in the above extract, uses this language:

"As we have stated, we will not enter into any investigation of the causes of the *dissension* between the parties, or the reasonableness or unreasonableness of their respective positions; that there is *dissension*, bitter and uncompromising, is beyond question; that such dissension precludes intercourse between the parties is their mutual declaration." (R. 391.)

It is hard to tell what the court meant by "dissension." If it meant that on the part of William May there was any animosity, ill-feeling, or angry words towards his mother and sisters and brother, or any of them, or any disagreement or contention with them upon matters in which they had any right of control, then the statement of the court *is not at all borne out by the facts of this case*, as will be shown further on in this brief. William May never had any sentiment towards them but that of affection and kindness; he treated them with courtesy and consideration, and his object in the management of the trust

was to benefit them and protect their interests. He has never had any feeling towards them but that of affection and good will. They found fault with his management of the real estate and the disbursements made by him; they found fault with him because he would not pay trust moneys to his mother for her support and the repairs of her house; they charged him with fraud, dishonesty, irregularity in his accounts, and neglect of duty; and if this fault-finding and these charges, which he suffered with patience and equanimity, constituted dissension, then they were the sole promoters of it, and the dissension is all on their side. William May had no dissension with any of the defendants, as is alleged by the court, except that he refused, when they attempted to interfere with his management of the trust property, to swerve from his rights and duties and refused to yield to any unreasonable demands. The fact is, he held the key to the position, *he had the power in his own hands*, and had no occasion for dissension. The codicil reads, in part, as follows:

"I hereby appoint my son William May *co-trustee with my wife, Sarah Maria May*, my said son and my wife to have and exercise the powers and authority in my said will mentioned and created, *except as hereinafter otherwise directed*. It is my further wish, and I hereby will and direct that my said son, William May, *shall take charge of my real estate* (except my present dwelling-house, which shall be and remain in the exclusive charge of my wife during her life) *and care for and manage the same for the best interests of my said estate, and in accordance with the terms of my said will*, and he shall collect the rents and income of my said real estate, and pay the lawful taxes and assessments *and other expenses* thereon, and shall keep the same in good repair. For the said service of my son William May in caring for and managing said estate and for collecting the rents and paying the taxes and assessments and other services, as hereinbefore directed, he shall and may

retain from money so collected, as his compensation, a commission equal to five per centum of the amount of money by him collected from said estate, *and the said William May shall render to my said wife full and true accounts of the rents by him collected, and of the disbursements by him made in the execution of this trust*, such accounts to be rendered each and every month, and shall be accompanied by the vouchers for such disbursements." (R. 7.)

The real estate thus given by the codicil to the *exclusive* charge, care, and management of William May constituted, in effect, all the property left by the testator. He left little personalty, except the household furniture, including silver, pictures, &c., and this was given by the will to his wife absolutely. The realty was worth about $250,000, and its net annual rental more than $12,000.

Sarah M. May had nothing whatever to do with the care and management of the real estate. William May was to collect rents, pay taxes and assessments and other expenses, and keep the same in repair. His only duty was to render to Sarah M. May monthly accounts of the rents collected and the disbursements made. It is true the *legal title* of all the property left by the testator was vested by the *will and codicil* in Sarah M. May and William May *as co-trustees*, for the codicil appoints William May *co-trustee with Sarah M. May*, "my said son and my wife to have and exercise the power and authority in my said will mentioned and created, except as hereinafter directed;" but she had no *active duties* to perform *as to the management of the real estate.* These were to be performed exclusively by William May. *She was only a technical, dry legal co-trustee as to the real estate.* Discretionary powers, it is true, were given by the will to be exercised by both co-trustees, and which, if exercised, might have required co operation and unity of action by them, such as the

power to sell any part of the estate, and reinvest the proceeds, and the power to give new mortgages, by way of extension, in place of those already charged upon the estate. But these powers were never exercised, or required to be exercised, by the co-trustees up to the time the "resolution" of removal was served on William May, and up to the hearing of the cause.

Not one of the charges specified in the cross-bill relates to any matter in which a *joint duty or joint act* was to be performed by *the co-trustees*. Every charge of fraud, misfeasance, irregularity or neglect of duty relates exclusively to the *management of the real estate* by William May, and there is not a word of evidence showing that the execution of any of the trusts which, if exercised, might have required *co-operation*, was delayed, prevented, or embarrassed by the alleged dissension and want of harmony. From the death of the testator up to the present time William May has collected the rents and income, paid taxes, assessments, and other expenses, and kept the real estate in repair, and rendered to Sarah M. May full and true accounts of the rents collected and disbursements made by him, accompanied by vouchers. Thus there never has been occasion for "serious disagreements" and "dissensions" between Sarah M. May and William M. May. There has never been occasion for them even to have *personal intercourse;* and as to the beneficiaries, William May had nothing to do with them, or they with him, further than to pay over their share of the trust moneys in his hands, if any there should be. It is true he had a trust duty to perform for their benefit and for the benefit of Sarah M. May, and if he failed to perform it they had power, under the terms of the codicil, "*for good and sufficient cause*," to remove him. The codicil reads:

"I hereby further will and direct that, *for good and sufficient cause*, my other heirs, with the concurrence of my wife if she be living, shall have and they are hereby given the power, by their unanimous resolution, to remove my said son, William May, from his office, as such trustee, and to appoint another person in his stead." (R. 8.)

But, as is aptly stated by Mr. Justice Hagner in his opinin, the "good and sufficient cause" must be such as would *justify a court of equity in making the removal.*" If William May misappropriated the trust funds, or if he improperly refused to pay over moneys belonging to the beneficiaries, or if he unreasonably neglected to render proper monthly accounts to Sarah M. May, or if he mismanaged the estate, or if he was unfit for the trust, or if he was guilty of any gross neglect of duty, he could and should have been removed, and Sarah M. May and the beneficiaries had power to remove him for any of these causes, or for any other good and sufficient cause. But when they come into a court of equity, as they have done by their cross-bill, and invoke its aid to carry into effect and execution their "resolution" of removal, the *burden of proof* is on them to show that the removal was "for good and sufficient cause," and what that is the court will determine according to its own rules of justice and fair dealing. They stand, therefore, in no better position than they would have stood if they had applied to the court for the removal of William May without having exercised the power of removal given by the codicil, or if no such power had been contained therein. Mr. Justice Hagner, in his opinion, says that "the words, good and sufficient cause, simply indicate such grounds for removal as the court, *without such expression*, would require to be shown before they would displace a trustee." (R. 380.) Simply because Sarah M. May and the beneficiaries, or some of them, found fault with, or objected to, William

May's management of the real estate and the disbursements made by him, and found fault because he would not pay moneys to Mrs. May for her support and to repair her house, was no just ground for his removal.

There is another important question to be considered. William May has a trust-power *coupled with an interest.* Under the will he acquired, *in his own right*, the fee simple to one-sixth of the real estate, subject to Sarah M. May's life interest to one-third of the profits, and by the codicil he acquired the right to five per cent. of the money collected by him from the real estate. By removing him as trustee his own share of the realty will be taken out of his hands, and he will lose more than $600 a year as commissions, the whole rental being more than $12,000 a year.

The Court of Appeals, in the above-quoted extract from its opinion, makes the following remarkable statement:

"The due execution of the trust requires concurrence of action, and consultation preliminary to action. *The trusts are all active trusts, in which the judgment and discretion of both trustees are necessary for their proper execution;* and we must suppose that it was to secure this concurrence of action, and to prevent the dissension that would militate against it, that the testator created the power of removal which he called into existence in his codicil." (R. 391.)

In answer to this statement, we would like to know what "*active trust*" is given to Sarah M. May in the charge, care, and management of the real estate, in collecting its rents and income, in paying taxes, assessments, and other expenses thereon, and in keeping the same in repair. The codicil excludes, and was expressly designed to exclude, her from all participation in such care and management. It is true the testator created the "power of removal" by the codicil, but it is absurd to say it was done to secure "concurrence of action" and prevent dissension by the trustees.

The testator would rise out of his grave to protest, if he knew his property was to pass into the hands of the very person whom he had, years before his death, resolved should not control it, and who then knew of the so-called "dissension," and had assured William May he would, after his death, protect him from it. But this matter will be considered further on. The court below seems to have decided this case upon sentiment rather than upon legal and equitable principles. If this "dissension" was objectionable, why did not the court remove Sarah M. May, who was the promoter and cause of it? She had only a life estate in one-third of the profits of the real estate, while William May had a fee simple to one-sixth of the real estate, and a vested title to five per cent. of the rents collected, which five per cent. amounted to more than $600 a year; and as the trust was to last, by the terms of the will, *at least so long as any child of the testator was living*, the five yer cent. would amount, in the end, to more than $10,000.

The testator, John Frederick May, was an eminent physician. Many years ago he resided with his wife and children in Washington city, where, by his skill and industry, he amassed a large amount of property. About the year 1871 he went to Europe with his family, where they remained several years. In 1874 they returned to this country. (R. 219.) Upon their return Mrs. May and the children desired to make their home in New York city. Accordingly the testator, in 1875, purchased with his own money (R. 101) a house in that city, No. 21 West Nineteenth street (R. 142), and had the deed for it made directly to his wife. (R. 101.) She subsequently, in 1882, reconveyed it to him. (R. 101.) Mrs. May and her children resided and continued to reside in the New York Nineteenth street house from 1874 until April, 1882. During this

period the testator passed most of his time in Washington, but making visits from time to time to the New York home. While Mrs. May was living in the New York house she lived much beyond the means of her husband. *Her extravagance and mismanagement were such that they were plunging her husband into hopeless bankruptcy;* and, in 1882, he insisted that she should give up the New York home, and that she and the children should return to and reside in Washington city. *William May sided with his father in counselling that the family should give up their New York residence.* But Mrs. May and the children who were living with her, except William May, bitterly opposed leaving New York. The testator's determination finally prevailed, and in April, 1882, they gave up the New York house (R. 142), and after that resided with the testator in Washington (R. 142), where they continued to reside until the testator's death. *The action of William May in aiding his father in causing the removal to Washington created deep feeling against him on the part of Mrs. May and the children.*

In January, 1882, the testator took a step which further estranged William May from his mother and the other children, and produced on their part a feeling of discontent and resentment against him, which continued unabated after the testator's death. By a written power of attorney, dated January 3, 1882, he authorized William May, who was then residing with his mother in New York, "*to receive all moneys collected from rents of my property in Washington city*, District of Columbia, by my agent, Thomas Y. Myers, *and to use and disburse the same for the payment of the taxes and repairs and improvements of said property, and all other debts and household expenses incurred for the support of my family in the city of New York.*" (Exhibit W. M. No. 4, R. 330.) Thomas Y. Myers, referred to in the

power, was then the agent of the testator in Washington for the collection of *all* his rents, *and these rents constituted the whole income of the testator.* On the 17th of December, 1890, a second power of attorney was given by the testator to William May, authorizing him "*to lease or rent my property in said city of Washington, to recover possession of the same, and to collect any and all rents which may at any time be due me from said property.*" (Exhibit W. M. No. 5, R. 331.) By virtue of these powers William May managed and controlled the property, moneys, income, and household expenses both in New York and Washington *from January, 1882, until the testator's death.*

In January, 1882, deep feeling and resentment against William May on the part of his mother and the children was created because the exclusive management of his father's property had been placed in his hands and all the income was placed under his control, *and he was made the vehicle through which all expenditures for the household should be made, and he used his authority to cut down these expenditures.* The testator was devoted to his wife and children. He was willing to make any sacrifice for them. But when he found their extravagance was leading him to financial ruin, he called upon his son to rescue him, his family, and estate. With what fidelity and success that rescue was made will be shown in the testator's letters to be hereafter set forth. The fact that William May was appointed by his father as manager, by whom all the expenses of the household were to be paid, from whom all moneys were to be obtained by the family, and to whom the debts contracted by Mrs. May or the children were to be submitted, caused bitter feeling on their part, not only against William May but against the testator. But the testator insisted on this management by William May, and it continued up to his death. William May, during this period,

held the purse strings, *and he would not sanction the expenditure by the family of moneys in his hands to the detriment of the estate.* Upon the death of the testator the antecedent management of the estate *was in large part perpetuated by the codicil*, and the old feeling of Mrs. May and the children was simply transferred from William May *as agent* to William May *as trustee.*

It is well to note the far-reaching power given over the estate to William May by the will and codicil. By the terms of the will (3d clause, R. 5) not one cent of the income of the estate was to be paid to the beneficiaries until all the mortgages thereon (amounting to about $32,000) had been paid, and no division of the corpus of the property could be made while any of the children were living, *and until all the children died.* William May was to hold possession, pay expenses, make repairs, and draw commissions. He and his co-trustee, Mrs. May, have power to sell any part of the estate, and reinvest the proceeds (4th clause, R. 5), but upon her death this power would of course devolve solely upon him as survivor. No wonder Mrs. May and the children desired the removal of this resolute man, so as to get the estate under their own control. William May's equitable interest in the estate is now worth about $40,000, and this value has been partly created by his skill and labor. Before ousting him the court below might have devised some means to secure to him *his share*, so as no mismanagement in future by others would affect his rights. In fact the removal of William May *breaks the will.* Nor more nor less a will solemnly admitted to probate is practically *revoked* by this act. When, upon the death of her husband, Mrs. May found she could not control the property or its income, she resolved to cause his removal, supposing that this power was given to her and her children by the codicil. Of course she

knows there must be a *cause*, but she was swift to find one, as will be hereafter shown.

The state of affairs in 1882 (and it remained the same up to the testator's death) cannot be better shown than by a letter of the testator to his wife, dated January 13, 1882, and two letters written by Mrs. May to her husband, dated, respectively, January 18, 1882, and May 8, 1882. Mrs. May admits she wrote the letters. (R. 163.) Her letters were sent by his father to William May in 1882, when they were received. Extracts from these letters will now be given.

On the 13th of January, 1882, the testator wrote from Washington city to his wife in New York, in part, as follows:

"I have just received yours of the 12th and it is with a broken spirit and a sad and desponding heart I take up my pen to answer it. For many years past I have entrusted you entirely with the management of my income from my property and you have always had that from your father's estate. No man has more completely put all his income into his wife's hands than I have in yours. When you were in Germany, I never sent you less than $1,000 per month and sometimes $1,200, and this in a place where living was so cheap, because I had it in my power to do so. Since our return to this country you have had the expenditure also of all my available means year after year for some seven or eight years, and during this time I have led the life of a slave, struggling year after year to maintain you and my children in comfort without impoverishing or infringing upon my capital, and I have made sacrifices as to my own personal comfort at an advanced period of life which few men have made, or would be willing to make. It has been all in vain; year by year my ability to do for you has lessened, my debts have increased, and my principal has, as a natural sequence, diminished, until heavily (and unless some help can be given me), hopelessly burdended with debt and my income diminished to less than

one-half what it used to be, *there must be some change, or I must yield to bankruptcy before a great while.* The gleam of hope lighted up in my heart when you wrote to me while I was last here that you had decided to rent the house in New York, and wished hereafter that I would send all the rents to Willie instead of to yourself, and the first words of comfort that I felt as to my continuing my struggle to save my property were those spoken to me by my dear son while I was last in New York, when he told me that he at last saw and understood the whole situation of my affairs; and that he would do all he could in the future to assist me; that he would do all he could to get a tenant for the house; *that he would curtail and keep down the expenses in New York until the house was rented, and would continue to do so until my debts were paid, and my property saved to my family.* God knows how grateful I felt to him for this sympathy and appreciation of my situation, and for his thus given me, as I have said, the first hope I have had to struggle through my debts if it please God to spare my life three or four years more. When you wrote to me of your own accord that you had decided to rent the house and wished Myers to account to Willie, I believed your eyes were at last opened to my situation, and that you intended by so doing to help me out of my trouble. I do not admit that I am as you say, your master, or that I intended in intrusting Willie to pay my debts and to assist me to give you a 'second master.' I was in hopes that you would look upon him as your aid and assistant and a good son, trying to help us both, and far from being your master I have been only too kind and indulgent (and from a good motive) as a husband in letting money matters be managed ever since I let them go out of my own hands. It was only to save the house in New York that I consented to your positive decision to deed it back, for, unless I can control it, it and my other property must slowly and gradually and inevitably go out of my hands. * * * Why should Willie and myself act in concert but for your good and that of my children? For what object have I, an old man, who has reached the allotted period of man's life, to act now but for you and others' benefit hereafter, and

when I am gone to my rest? Try and think and reflect on this dispassionately and without bitterness in your heart towards me, and help instead of thwarting Willie in his endeavors to help me. Do not look upon either of us as masters, but as a husband and a son looking only to the welfare of a wife and mother." (Exhibit W. M. A., R. 65–67.)

On the 18th of January, 1882, Mrs. May, in New York, wrote to her husband at Washington, in part, as follows:

"As I wrote you last week, *I positively decline handing over to Willie the bills I owe.* * * * I would like you to find the letter in which you say 'I wished hereafter that that you would send the rents to Willie instead of myself.' When I asked Willie to be the medium between us in money matters, he told me you were equally well pleased with the suggestion, and you and he arranged that Myers should send him the accounts, *but the money he was to give me for disbursement.* These are the facts of the case; the subsequent arrangements you must have decided upon after I had deeded back the house to you, for had I rented it I could have been wholly independent of you had I desired it. I am now in my 54th year, and to the best of my recollection I have never been in such a rage of indignation as I have been in at the unmerited and undeserved insult you have seen fit to put upon me *in telling my child he was to keep the money and pay the bills.* You wrote, 'I had to guess at or approximate those due in New York, for your treatment of me before I left was so cold, and your manner to me so forbidding, that I asked Willie to try and get me a knowledge of every bill you owed, including the servants' wages.' God being the judge of the secrets of all hearts, could you appeal to him for the truth of that statement? My manner was not so forbidding that it prevented you from asking me to give you the deed to this house to look over, as you expressed it. I do not wonder that you sent your son with me to witness the signing back of that deed. I don't envy your feelings in receiving back the gift which you said, when you gave it, was to save me from the power of any son-in-law, who might be claiming his wife's rights, to turn me out of home." (Exhibit W. H. S. 10, R. 240.)

On the 8th of May, 1882, Mrs. May wrote to her husband, in part, as follows:

"I am just in receipt of yours of the 6th, with the deed for my signature. I am much pleased just at this time to find that the law at least recognizes me to be of sufficient importance to require my name to any transaction you may engage in. I have never before refused such request from you, but your treatment of me during the past winter has taught me a lesson I shall not soon forget. I now see, for the sake of others, that *in returning to you your gift of the house in 19th street* I committed the most unwise act of my married life. Long before I made up my mind to do so, as you had so often made me feel how much you desired to obtain absolute control of it, you had tempted me with the bait that I could have an apartment in N. Y. and could even own a cottage at Mt. Desert. * * * Now, not only have you cruelly wounded me by the action you saw fit to take in the winter, but when my home is broken up I am subjected to every annoyance it was possible to subject me to, and not one promise kept. * * * *The present state of feeling between man and wife is a sad one to reflect upon after 33 years of married life*, and with the dawn of your 70th birthday so nearly upon you." (Exhibit W. H. S. No. 12, R. 242.)

The feeling of Mrs. May in 1882 towards her husband is shown by a letter written by her May 5, 1882, to William May. It is in part as follows:

"Your father is bound to support us according with his means, and I have done nothing but yield all my life, for peace' sake. I am determined now to have my rights for the sake of others, *and if I do not succeed through you I shall have recourse to other means.* He has allowed one absorbing passion to eat out the better feelings of his nature, and the result is unhappiness to himself *and those whose love cannot be bought or retained through money.*" (Exhibit W. H. S. No. 11, R. 241, 242.)

William May assumed the management of the household affairs in New York purely from a sense of duty and to aid the family. The motives that actuated him are shown in a letter from him to his mother, dated February 1, 1882. It reads in part as follows:

"Will you not, for the short time that I shall now be with you in New York, try and see that in what I am doing I am but doing my duty and acting for the interest of all? If you can only do this, I am sure that in future you will be glad that you did so, and it will make it much easier for me in the present to do what I conscientiously believe to be right. It is not meant as any slight towards you; or, as you say in your letter to papa, as an insult to your management, that he is acting as he does at present, but simply that he feels we can, realizing the necessity for the strictest economy at present, attend to the money matters more fully than you, who have so much else to think of, could possibly do. *I am so happy, too, in the thought of being useful to the ultimate comfort and benefit of us all, that I have the courage to bear your unjust reproaches.*" (Exhibit W. H. S. No. 13, R. 243.)

We desire to call special attention to the following extracts from the testimony of William May, and also of the plaintiffs in the cross-bill, Julia May, Edith S. Randolph, Alice Beavor-Webb, Caroline K. Wright, and Sarah M. May, the children and widow. The admissions of the last five are significant. Also to the extracts from letters from the testator to William May.

William May testifies (R. 102):

"I was my father's adviser upon all matters of business. (R. 102.) He never undertook anything, not even the renting of a room, without consulting and asking me, and he generally followed my advice. I collected all the rents, had charge of all his money, and frequently when he wanted money to pay bills he would come to me and ask me for it,

as it was to my credit in the bank. *I had a power of attorney* to take charge of his estate and manage it as I saw fit; collect rents, make disbursements, and pay everything that was necessary and proper for carrying on the business of the estate. (R. 102.)

"During his life, and immediately prior to his death, I was his agent and in absolute control of his property. I did it through powers of attorney given to me by him, constituting me his agent to collect and transact his business, make disbursements, and do everything that was requisite and necessary for the proper carrying on of the business of the estate. (R. 103.) I think it was in 1882 my father put me in possession of his business as his agent, and I continued to act in that capacity for him, down to the time of his death, in absolute control. (R. 103.) I think I can say absolutely and positively I have had charge of my father's estate since 1882. (R. 255.) That was an absolute charge and control. I acted under *powers of attorney*, but there was never anything done—there never was a room rented—that he did not refer to me." (R. 255.)

(The powers of attorney referred to by the witness are marked Exhibit W. M., No. 4, and Exhibit W. M., No. 5, and are set out at pages 330, 331. They are offered in evidence at page 280.)

"The first power of attorney was given in New York, when I first took charge of his business there in 1882. (R. 255.) My father and I were contemplating the removal of the family here to Washington. They did not want to come and resisted it in every way. He determined it was best, and I agreed with him that it was best for the interests of all of us, to save money to live on in the future, to move on to Washington. At that time I was managing his affairs, getting ready to break up the house, having the furniture packed, receiving his money, paying his bills, &c., and it was then that he gave me the first power of attorney. (R. 255.) After I came to Washington in 1882 I continued to act in full and absolute control of the property. If it was possible I had more control here than I

did in New York. I had charge of all the household affairs. I paid all the servants; I went to market for him, and if he wanted $10 he would come to me and ask me whether he could have it. I had absolute control of his money in every way. (R. 255.) I collected his rents and I drew the leases in many instances. I paid his taxes, insurance, &c. (R. 255, 256.) There was a second power of attorney given to me four or five years later. Under the first and second powers of attorney I continued to take charge and exclusive management of his affairs, or of his real estate from 1882 until he died. (R. 256.)

"The rest of the family and myself had a row in New York in 1882. *The same thing I am going through now occurred then. When I took charge of my father's business there I went through all this.* (R. 258.) When we returned from Europe my father was very anxious to come to Washington. His wife said 'that under no circumstances or conditions would she live in Washington;' that New York was where she wanted to stay. He acceded to her demand, and bought a house in New York, and then he came here and sent her every cent of money he could get. He economized so he used to cook his own breakfast and black his own boots. (R. 259.) The family objected to coming away from New York to Washington at the time they moved here. That was in 1882. He insisted upon the family coming to Washington, and he told me to rent the (New York) house. (R. 259.). The result of this action on the part of my father was that Mrs. May became indignant with me and angry and accused me of usurping rights and powers that I had no right to. (R. 259.) *I was acting under my father's direction.* All the other members of the family wished to live in New York. My mother was indignant at the idea of coming to Washington, and at the idea of my being the means, as it were, of the removal. She was going beyond her income in New York every month several hundred dollars, and was in debt for bills contracted about the city, which I paid. (R. 260.) My father had to mortgage his property to pay those bills. The taxes in Washington were unpaid for two years. The interest on the mortgage in New York was overdue a year,

the taxes were unpaid a year, and the condition was such, as he says in his letters to me, that he was on the verge of bankruptcy in consequence of the way Mrs. May had handled his money in New York. It gave rise to a dissension in the family. *They all united with my mother against me as they have now*, because I was doing what my father directed me to do, not only in counselling the removal to Washington, *but in taking charge of the house generally.* (R. 260.) My father never lived in New York. He lived in the May building (Washington), and went backwards and forwards to New York. (R. 260, 261.) He left me in New York to represent him. There was owing to the cook $300 and to the dining-room servant $200, *and the debts amounted to* $10,000, *or thereabouts*, notwithstanding the income here every month, every dollar of it had been sent to Mrs. May. (R. 261.) The family were forced finally to go to Washington. I think the house in New York was leased in May, 1882. (R. 261.) They came to Washington in the fall of 1882, where they have resided ever since. For the part I took in coinciding with my father in this move I incurred their resentment very much." (R. 262.)

The witness was handed by his counsel a series of letters written by his father, at Washington, to him while he was living in New York, and they were offered in evidence. (R. 283, 284.) They are all dated between January 16, 1882, and May 31, 1882, and are marked, respectively, Exhibits W. M. from A to Y, and are set out at pages 342–365 of the Record. These letters require examination, as they show the source of the alleged "dissension," and that the testator anticipated, after his death, the opposition of his wife and children to William May's management of the estate, and promised to protect him from it.

In the first letter, dated January 16, 1882, the testator, in part, says:

"I have received this morning yours of 14th, and also one from your mother. The latter, I am sorry to say,

shows no spirit of relenting or of compromise, *or of any disposition to aid me.* But, on the contrary, it is harsh, unjust, and most unkind in its tone to me, *and also towards you.*" (Exhibit W. M., A; R. 342.)

In the next letter, dated January 20, 1882, the testator, in part, says:

"I have received your two letters of the 20th, *and also a long and bitter one from your mother.* It is very hard upon me when I am struggling and trying to do my best for her and the children, instead of receiving encouragement, to get only accusing and harsh words. I enclose the letter that you may see more fully what she writes me to do. I shall answer it shortly and kindly by telling her again if she will send in all the bills to either me or you, *I will borrow the money necessary to pay them by mortgaging my property.*" (Exhibit W. M., B; R. 343.)

In the next letter, dated January 23, 1882, the testator, in part, says:

"But, first, let me say that the great interest you take to try to help me in my money difficulties, *and the disposition to economize in household affairs, and the business capacity you show in every way,* is to me a source of great comfort, and is in fact the only encouragement I have had for many years past to persevere in my struggle to free myself from the slavery of debt. Go on, my dear son, as you have commenced, *and I will sustain you to the best of my ability,* and by our united efforts I may, I hope, in the course of some years, again be a free man, with my credit unimpaired." (Exhibit W. M., E.; R. 345.)

In the next letter, dated January 31, 1882, the testator, in part, says:

"I have received a complaining and harsh letter again from your mother this morning, in which she asks me to define *what is her position in the household,* &c., and say-

ing she had not money to buy car and stage fare for herself and the girls until she made Fred aware of her situation and borrowed from him. I have written her a long and kind but decided letter, telling her that, having tried her management for eight years, and being heavily involved in debt by it every year, I could not remain passive any longer when help was offered me, *and thus to submit to financial ruin, and that I should continue to send you all the income*, as it was on this condition you agreed to manage for and assist me." (Exhibit W. M., F; R. 347.)

In the next letter, dated February 2, 1882, the testator, in part, says:

"I have received another letter from your mother which has done nothing to soothe my feelings, but, on the contrary, to hurt them still more, and she still uses the same terms and 'always' and others more—enclosing her letters. *God only knows how she can justify herself for her treatment of me. I have either to give up, and let her continue to send everything to ruin, or to stand firm and try to retrieve myself and property, and I shall do the latter.*" (Exhibit W. M., G; R. 347.)

In the next letter, dated February 10, 1882, the testator, in part, says:

"Is it not strange, because I will not sit quiet and be ruined by her (his wife), she acts towards me so unkindly by writing me such letters. I am striving hard here day after day, from daylight until dark, for others, not myself, and only get hard words and thoughts and undeserved accusations. I cannot understand how she can reconcile her conscience to have left me for eight years, have lived the life I have, while she has been enjoying all the luxury and comfort of her home in New York." (Exhibit W. M., I; R. 349.)

In the next letter, dated March 2, 1882, the testator, in part, says:

"I have just this moment received yours of 1st, enclosing monthly statement. *It is, indeed, a splendid showing of what you have done, and what might have been done long ago, if I had had such a manager as you are in New York to look after household affairs.* I am truly thankful to you for your attention and good management, and trust you will continue as you have begun. The statement is perfect in its neatness and accuracy, and I shall take good care of those statements to show, I hope, hereafter, to your mother how she may become reasonable, and will, I hope, thank, *instead of blaming you, for your action.*" (Exhibit W. M., K; R. 351.)

In the next letter, dated April 3, 1882, the testator, in part, says:

"I have drawn my will and put my name to it yesterday, so rest easy on that score, *as I have the clause in it that fully protects you.*" (Exhibit W. M., M; R. 352.)

Of course the will here referred to was revoked by the subsequent will of 1890, admitted to probate. What the *clause* contained is explained in the next letter, as will be seen.

In the next letter, dated April 16, 1882, the testator, in part, says:

"Your mother must settle with Croggie the $60 she borrowed without my consent from her own income. I have been paying her household debts, run up in every direction, without reference to me for 10 years, or since she has had charge of the income, and I have paid for money she has borrowed without my consent (for she would borrow from any one who would lend her), and I will not, for I have not the power to do so any longer, and this you may tell her. She seems to care nothing for my interest or my welfare, and I have suffered so long and so deeply, I will yield to her no more. This is the way things have been going for eight years, and I making shift all that time to supply the

leaks in New York *from your mother's mismanagement of money matters.* I wonder how I have—to use her expression—'pulled through'—as to keeping my health and credit here. *In New York she has utterly destroyed it,* and now I repeat what I have said to you before, unless you had seen what the true state of the case was, and come as you did to my assistance, *bankruptcy would have been the inevitable result for me in old age, and after all my hard work and toil for my family.* As it stands, if we can by economy here save enough to clear off the money I shall owe, you will have charge of a fine and most valuable property, and one which will go on improving in value from year to year. *But as you will hold the purse-strings in future, you must be firm and yield to no persuasion or threats from them,* who have so long shown so much neglect and indifference for me and my interest. *You are fully protected in my will, which has been executed, and in it I give you, as my trustee, full and ample power to direct my estate in case of my death.*" (Exhibit W. M., N; R. 354.)

What a commentary these letters are! Yet in the face of them the Court of Appeals gravely asserts (not as an expression of humor) that it was to secure "concurrence of action" and to prevent the dissension that would militate against it that the testator created the power of removal which he called into exercise in his codicil. (R. 391.)

The deposition of Julia May, one of the children, was taken *on behalf of the plaintiffs in the cross-bill.* The interrogatories and cross-interrogatories are set out at pages 79–82; the answers to them are set out at pages 82–85.

In answer to the 16th interrogatory this witness says:

"My relations with my brother (William May) *have been very strained for a long time.* Then there were intervals when it was not quite so bad. Directly after my father's death, *and just before my father's death, during the time of his illness, it was just the same as at present.*" (R. 80, 83, 84.

In answer to cross-interrogatories the witness says:

"I was residing with my father and mother at the 19th street house, New York, when circumstances arose relative to removing their residence to Washington, which led to differences between them. *My sympathies were all with mamma.* I do not know whether my father left New York in great anxiety of mind as to money matters. I thought that matter was exaggerated. (R. 85.) After my father quitted New York it was not very long before William followed him. We left New York in the spring (of 1882), but how long it was after my father's departure I can't tell. (R. 85.) He went away, perhaps, towards the end of winter; then we left in the spring. *In the interval William May was made the vehicle of disbursements of moneys to support the household.* (R. 85.) I think it was the fact of William's whole treatment of the family *that caued the feeling of resentment against my father and William by my mother and other members of the family.* (R. 82, 85.) The fact that William was the vehicle of disbursements for money to support the family could not have caused a feeling of dissatisfaction, but his rude treatment of the family. I am speaking of my brother William there, *but it seemed very hard that my brother should have us all under his control. It seemed unfair in my father. We all thought it was very unjust to have to go to him (William) for things.* (R. 85.) William was my father's agent *from the early part of* 1882 *until he died.* (R. 82, 85.) He collected the rents and turned the money over to my father." (R. 82, 85).

Edith S. Randolph, one of the children, *and a witness on behalf of herself and the other plaintiffs in the cross-bill,* testifies:

"I was married at the time the family removed from New York to Washington. (R. 178.) I stayed at the house on 19th street (New York) as a married woman several times. I did not accompany them on the return to Washington, I am happy to say, because my brother

(William) was pretty disagreeable *even in those days, I believe.* (R. 178.) I think that my brother at that time was not particularly pleasant, as I have been given to understand, but I know nothing of it. (R. 178.) The family dissensions in which my brother played a conspicuous part were after I was married. I paid short visits to the house in New York, but never lived there for any length of time after I was married. (R. 178.) I believe my father assigned as a reason why he wanted to return to Washington with his family because he thought Washington was less expensive than New York, and therefore it would be better for us to return to Washington. *I knew, of course, there was a great deal of dissension about the step of going back to Washington.* (R. 179.) I visited the New York house about the year 1882, and previous to that time, while the family was making its residence in New York. I know there was trouble of some sort about my father's decision to remove the family from New York to Washington. I know that my mother wanted to stay in New York and my father probably wanted them to go back to Washington. (R. 180.) He cried 'wolf' so often that when he said he could not afford to live in New York, we thought he could afford that as well as anything, because I had heard that same story all my life. (R. 180.) Up to the time my father quit New York as his residence, I suppose the household expenses had been defrayed by my mother. *After my father went to Washington I heard he appointed his son, William May, as manager through whom the expenses of his household were to be paid.* (R. 181.) I don't know whether I heard it about that time or not. I was away from home, and I was sorry there was trouble, but outside of that I did not mix myself up with it. *I heard there was a great deal of trouble.* (R. 182.) *I am personally interested in this controversy, and I want to protect my mother as much as possible.* (R. 182.) I remember before the family left the 19th street house I was living up the Hudson, and my brother came up there, and we visited one or two places in regard to the family moving there. My mother has stopped with me different times up the Hudson and at Douglaston.

(R. 183.) I really could not tell positively whether, about the early part of 1882, a visit was made to me by my mother which covered some length of time. I do not doubt that while she was staying with me *she complained to me very much that the money she received from Washington from my father was sent to her through my brother William;* but I could not tell you positively about that; if you want me to swear she said that I could not do it. (R. 183.) *I know she felt that William, from having been very kind, had absolutely turned around.* (R. 183.) *He agreed with my father about everything.* My brother came to Washington, and I believe he got the house where we are living (G street) in order for the family. (R. 183.) My brother William was very excitable; my father was very excitable; my brother Frederick May is a man of excitable temper. (R. 185.) I do not think we were any more excitable than the general run of families." (R. 185.)

The deposition of Alice Beavor-Webb, one of the children, *and a witness on behalf of the plaintiffs in the cross-bill*, was taken on interrogatories and cross-interrogatories. (R. 79–82, 85–87.) She testifies:

"I was living with my father and mother at the 19th street, New York, house when circumstances arose relative to removing their residence to Washington. (R. 81, 87.) The house in New York was given up less than six months after my father left, but I do not know whether or not my brother was in the interval made the vehicle of disbursements for moneys of the household. (R. 81, 82, 87.) I know, from what I have been told, *that my brother had the disposal of the money*, but I have no recollection of that; *but I remember distinctly, at the time, that there was a very strong feeling against my brother for the way he treated the whole family.* (R. 87.) I know there was some unpleasantness, but I cannot tell what the details of it were *with regard to my father.* (R. 87.) My brother helped (my father) from the early part of 1882; he helped him collect the rents. Towards the (end) of his life he

(William) collected the rents entirely, and looked after the property more or less." (R. 82, 87.)

Caroline K. Wright, one of the children, *and a witness on behalf of the plaintiffs in the cross-bill*, testifies:

"As soon as I learned that, under the terms of the will, my brother was appointed trustee *I anticipated all this trouble.* (R. 157.) *I was not friendly to him at the time of my father's death.* (R. 157.) *I have never had very friendly feelings to him.*" (R. 157.)

Sarah M. May, the widow of the testator, *and a witness on behalf of the plaintiffs in the cross-bill*, testifies:

"I am the *executrix* of the will. (R. 109.) Dr. May died on the 1st of May, 1891, and I qualified as executrix on the 19th of June, 1891. (R. 109.) The relations between William May and myself at the present time are very strained. That condition of affairs arose soon after his father's death. *The enstrangement did not begin then.* (R. 110.) Soon after Dr. May's death he showed an utter indifference to my means of support, and how I was to carry on the household expenses. (R. 110.) I had business communications with him about June and July of the same year in which Dr. May died. Always, from the first, his manner would give any one to believe that the estate was his; that I was a beneficiary, as he chose to give it to me; that was about it. (R. 111.) His manner all along assumed a great deal, and he was not very pleasant to get along with. He was domineering *just in the way that he assumed everything as his own, and I was to be a subordinate, as it were, to whatever his views might be. We never came to any personal altercation, because I would not allow it.* I am only doing all this, as you know, from the highest sense of duty, and not with regard to myself, as I should have let it go by, probably, after remonstrance with him. (R. 113.) *I was not harassed by him by any especial words, further than his refusal to do things.* (R. 116.) He was never accustomed to ask my advice about the busi-

ness of the estate. When I said to him that I considered it a great responsibility his father had put upon me as executrix and trustee he laughed at the idea, and said that it did not amount to anything; that the executrixship lasted only a year, and was merely a formal thing; that it did not amount to anything, and there was no duty attached to it." (R. 116.)

"Q. You speak of unpleasant and strained relations. Had any trouble in the family or disagreement between you and Dr. William May arisen about the management of the business of your husband *prior to your husband's death?* Had it given rise to any discussion between your husband, yourself, and the other members of the family? (R. 134.)

A. *It gave rise to some discussion*, but Dr. May, of course, claimed that the errors were forgetfulness, and they were looked upon as forgetfulness. There had been errors in his accounts prior to his father's death. (R. 134, 135.)

Q. Had there, or had there not, been any disagreement in the family with reference to his being in the possession of and managing his father's business?

A. *He was never in possession*, and how could we have any (dis)agreement about that. (R. 135.)

Q. He never had any authority?

A. Never that I heard of. In fact, from his father's lips, about three weeks before his death, I learned that Willie had never done a single thing without his ordering him to do it. He never did, and if he has any paper showing that he did, it will be a greater surprise to me than to any human being. (R. 135.)

Q. Are you aware of the fact that he held a regular and formal power of attorney from his father?

A. No; I am not. (R. 135.)

Q. You are not aware of that fact?

A. I never was. (R. 135.)

Q. You seemed to have considered it an improper thing for your son to arrogate to himself the right to treat the property as his own?

A. Yes. (R. 147.)

Q. Who had so good a right as he did, having been made trustee of the property?

A. I was trustee with him, and I had my rights as well as he did, so far as the property was concerned. (R. 147.)

Q. That is, so far as interest in the property was concerned?

A. Yes, sir.

Q. Do I understand you to say that you found fault with him for not allowing you, jointly with him, to assume the management of the real estate, collect the rents, and take general charge of the affairs? (R. 147.)

A. No; not at all, sir. I quite understood what his rights were and what mine were, and I never attempted to arrogate anything in that respect or to interfere with his collections of rents and disbursements of money which the *will* had allowed him to have the distribution of. (R. 147, 148.)

Q. Under the terms of the will he was sole trustee *for that purpose*, was he not?

A. He was not the sole trustee; he was only made trustee *by a codicil;* he is not mentioned at all in the will proper. (R. 148.)

Q. Let me read you what the will says upon that subject, which was the basis of his assumption of authority: "I hereby appoint my son, William May, co-trustee with my wife, Sarah Maria May, my said son and my wife to have and exercise all the powers and authority in my said will mentioned and allowed, *except as hereinafter otherwise directed*. It is my further wish and I hereby will and direct that my son, William May, shall take take charge of my real estate and care for and manage the same to the best interest of my said estate."

A. Yes. (R. 148.)

Q. Do you not think that gave him the right to take exclusive management of the trust real estate?

A. It all depends upon the manner in which you do it. You can treat it as a trust fund, and you can treat it assuming it to be your own, and so as to give that impression to others. (R. 148.)

Q. *Do I understand you to say that it was in respect to his claiming to exercise sole powers, and refusing to be interfered with by you, that led you to consider he had arrogated too much to himself?*

A. *Not entirely;* it was the manner that went with it. (R. 148.

Q. What displeased you was the fact that he claimed to to have absolute control of that real estate without consulting you as to what he should do as trustee of the real estate?

A. That manner displeased me, because I did not consider it was a proper and respectful manner, nor was it a fact that the property belonged to him. (R. 148.)

Q. The legal title to trust property is vested in the trustee by the instrument which creates that party trustee.

A. Then, why was I named as trustee if it was entirely in him?

Q. But in naming the trustees, and pointing out their respective duties, the will said he should have charge of the real estate, and that your trusteeship should remain as it was under the will, *except as thereinafter qualified.*

A. That is a point which the court will decide. (R. 148.)

Q. I am bringing these things to your mind——

A. They have scarcely ever been out of my mind. (R. 148.)

Q. You do not now say that he did any more than he was authorized to do, when he claimed the sole management of the trust real estate? (R. 148, 149.)

A. I do; for he claimed much more. *There is the spirit and there is the letter. If you go entirely by the letter you lose sight of the spirit. I know the spirit in which that trust was given.* (R. 149.)

Q. No matter about that. I did not ask you about that.

A. But I have a right to answer you and to explain my position, certainly. I have a right to explain my position and my reasons. I do not want to do anything more than that." (R. 149.)

The above-recited testimony of Mrs. May alone ought to be conclusive of the case made by the cross-bill, so far as the question of disagreement and dissension is concerned after the testator's death. She admits that the strained relations and estrangement between herself

and William May *did not begin at the testator's death* (R. 110); that he was not domineering, except in the way that he assumed everything as his own, and she was to be subordinate to his views in the management of the estate (R. 113); that there was never any personal altercation (R. 113); that she was not harassed by him by any especial words, further than his refusal to do things (R. 116); and that she considered he arrogated too much to himself, *partly* because *he claimed to exercise sole powers in the management of the real estate, and refused to be interfered with by her.* (R. 118.)

As already stated, the management and control over the estate and its income, given by the testator to William May from 1882 to the time of his death, was deeply resented by Mrs. May and the children. During this period he held the purse and disbursed the money for family uses. It was for him to decide how far the family could go in their expenditures. He collected the rents, paid taxes, made repairs, and removed tenants. Upon the death of the testator, Mrs. May and the children discovered that this management and control was, in large part, continued by the codicil. It is true William May no longer held the purse in family expenditures, but large powers of management still remained exclusively in his hands. *Under the will they could not receive one cent of the income of the estate for their support until all the mortgage debts had been paid* (3d clause of will, R. 5), *and the mortgages amounted to* $32,000. (Exhibit C, R. 5.) The burden of their complaint was that he refused to pay trust moneys to Mrs. May for the expenses of her household, when he was advised by counsel he was not authorized to do so. *Immediately after the testator's death,* thinking they had the power under the codicil, they resolved to remove William May from the trusteeship and get the property and its income under their own control. This

resolve could not be carried into immediate execution, for Frederick May, one of the children, was then in Chile, South America (R. 239), and his consent had first to be obtained. Of course there must be a *cause*, but this was soon found.

The testator died on the 1st of May, 1891. William May had been accustomed in his father's lifetime to render to him monthly accounts of the rents collected and disbursements made. The testator had received the monthly account for January, 1891, but the monthly account for each of the following months, February, March, and April, had not been rendered to him owing to his illness. Of course, William May was under no obligation to render to Mrs. May the accounts for these three months. His trust did not begin until May 1, when the testator died, and if, on that day, he held in his hands moneys antecedently collected *as agent* for the testator, Mrs. May, *as executrix* under the will, had, perhaps, a right to demand them, but he was not required to render monthly accounts to her for his antecedent agency. Mrs. May, however, requested him to render to her monthly accounts for each of these three months, and on the 23d of May, 1891, *three weeks after the testator's death*, he delivered them to her at her house. In the monthly account for January, 1891, *delivered to the testator*, there was a charge of $1,174.60, and this charge was, by mistake, duplicated in the monthly account for February, 1891, *delivered to Mrs. May*. How this mistake occurred, and how it was corrected by William May in the monthly account for May, 1891, *the first monthly account rendered by him as trustee*, will be explained hereafter. Of course Mrs. May discovered this error at once, *but she purposely concealed the discovery from William May, and gave him at the time no opportunity for explanation*. She consulted, however, with the other children who were then living in the house with her, and they all thought, or pretended to

think, that the error, whether made purposely or by mistake, was a *cause* for William May's removal, and they then resolved to remove him. Then Mrs. May went to consult Mr. Totten, her attorney. Early in June, one month after the testator's death, Mrs. May entered into an agreement with William May that the monthly accounts relating to the estate should thereafter be sent to Mr. Totten, and in June she refused to have any further *business intercourse* with him except through Mr. Totten. The *personal* intercourse, however, continued as before. On the 26th of June, 1891, Mrs. May and the children went to Bar Harbor, where they remained for four or five months. But we will let Mrs. May tell her own story. She testifies:

"Dr. May died on the 1st of May, 1891. (R. 114.) There were still accounts unsettled. Dr. May (the testator) had received the monthly account for January (1891) from William. I asked him repeatedly to come to the house and bring the accounts for February, March, and April (1891), but he did not do so; there was always some excuse. Then, on the 23d of May (1891), after repeatedly asking him for these accounts, he brought them to the house with a lot of vouchers. He went through with the tenants, &c., and he held up a large pile of vouchers. As he got through with them he carried them off. I did not look at any voucher (R. 114), I merely looked at the names of the tenants, and compared them with the January statement, so that I might get to know who they were, &c. The following day he came in, and still those papers were there; I had not removed them. It was not until some days afterwards that I was startled, on examining them carefully, to see this charge of $1,174.60. On the day he showed it to me I thought it was $174. It occurred to me I had seen those figures somewhere, and I went to Dr. May's bank-book and found that that check had been paid in February to him. Of course, that startled me very much. I considered any one who had had charge of papers until the 23d of May with an error of that kind in them, and had not noticed it, *was un-*

capable of taking care of the affairs of an estate. He had had no business training. He had never had anything of this kind to do. Of course, his accounts with his father were different. His father knew what his estate was, and whatever errors occurred there he could correct, but it was not my business to do that. There was a trust committed to me for others, and not for myself alone. I then asked Mr. Totten's advice about it. *I did not bring to William May's attention the circumstances of this check for* $1,174.60, because I knew, or I felt that he would give me some answer that might not cover the ground, and that I might not, with as great freedom, go to counsel. I thought I should go at once and ask advice about a matter so important. It was then that Mr. Totten saw William and told him to make changes in his account. The accounts came in for May in the month of June, and before I had opened the package William sent for it, and asked me to please send it back to him, as he wanted to make some changes that Mr. Totten advised. I ought not to have given them back to him, but I did. At the same time, before going over it, I took the final numbers on the account, and when the account came to me again the numbers were changed. Those first vouchers, with the three months' account, I never saw—for the months of February, March, and April. I never had them in my hands. William held them up to me and said, 'These vouchers are my receipts and my property,' and he took them away with him. I never saw them to examine them. (R. 115.)

"*The business relations between William May and myself ceased after June* (1891), after I had consulted Mr. Totten. (R. 116.) I saw a change in the account which was sent to me the second time—the May account. We had no further communication. I left for Bar Harbor on the 26th of June, 1891, and the accounts were sent to Mr. Totten by agreement. William agreed to it at the same time, and I supposed, of course, that he was going to submit them to Mr. Totten's direction. I supposed, of course, he would be governed by the advice of Mr. Totten, whom he seemed to have great confidence in and great respect for his opinion, so much so that I thought that would be the

end of the trouble. *His sisters were very unwilling to continue him*, and the will said that for good and sufficient cause we had it in our power to put him out. *We believed we had good and sufficient cause, and that he had shown his incapacity to take care of the estate.* (R. 116.) The account for the month of January was not rendered to me; is was rendered to Dr. May. The three accounts for February, March, and April were prior to Dr. May's death; and that for May was afterwards." (R. 117.)

(These accounts for January, February, March, April, and May are set out at pages 224–236 of the record.)

The witness resumes:

"In the January account there is a balance of $1,174.60, which appears in Dr. May's check book in February, and William May takes credit for the same amount, $1,174.60 in the February account. *This error is corrected by William May in the May account*, (1891). *The entry in the May account is: 'By error in charging twice*, $1,174.60.' (See the entry at page 235.) The May account was brought to me the 7th, 8th, or 10th of June (1891). (R. 117.) The facts that such accounts were sent in showed that they should be supervised by some person that understood bookkeeping. I did not pretend to understand anything of that kind. The heirs considered it was important for some one other than myself to see these accounts. At that time Dr. (William) May agreed that they should be seen, and there was a paper drawn up in Mr. Totten's office, and Mr. Dennis was then employed as the one who was to examine the account by the agreement of William May and the other heirs. (R. 118.) *Mr. Dennis began his work in November*, 1891. He continued his duties until the suit was brought (May 2, 1892).

"After the employment of Mr. Dennis, whenever William came to see me, he tried to bring up the subject of business, but I said, 'Willie, remember that is a subject not to be broached between us.' *I always declined to talk business with him. I objected to have communications with him about business, because I did not think he had shown*

himself competent, and we wished to put him out entirely, and to have all communications at an end between us. We thought we had given good and sufficient grounds. (R. 118, 119.) *Prior to that time* (*i. e.*, prior to November, 1891) *there was nothing disagreeable in my efforts to communicate with him personally, except this disagreeable manner that he always affected that everything was his. This was pretty much the amount of it.* I had known *from long experience* that there was no arguing with Willie. (R. 119.) I never saw him when, during our intercourse, he did not attempt this self-assertion. *There were no manifestations of temper on his part; no violence.* (R. 119.) On the 14th of May he said that if he died there was nothing to come to his wife, and he had been advised that some paper could be gotten up, if they all signed it, by which she could come in for something. I told him then that she would have to take the chances I had taken in marrying a poor man; that he had strength and health and youth, and could make something for her, as his father had done for me. There was nothing further disagreeable in that interview. I never allowed him to go beyond a certain point, because I was quiet and told him it must stop. But as between mother and son I have never refused him my house. I have written to him always on his birth-day, and have sent him little tokens of remembrance on Christmas just to notice the day. I have received no notice of them of late. He now addresses me as Mrs. May, and signs himself, 'Most respectfully,' and all that nonsense. Up to some time last summer it was always 'My dear mother.'" (R. 119.)

What a flood of light the above-recited testimony of Mrs. May throws upon the case! Yet it was all brought out by her own counsel upon the examination-in-chief. Is William May to be thrown out of his office, a disgraced and dishonored man, and is his patrimony to be taken out of his hands, simply because his mother, without cause, *and for the admitted and avowed purpose of ousting him*, declines direct business intercourse with him? No contin-

gency has yet arisen requiring co-operation by them in the affairs of the trust, nor is any ever likely to arise. William May, in the ordinary sphere of his trust duties, is supreme. He has no occasion to have any communication or intercourse with Mrs. May and the beneficiaries, or any of them. His duties towards them are fulfilled when he presents proper monthly accounts, and, by agreement, these are to be furnished through their counsel.

The following is William May's explanation of how the mistake in charging the $1,174.60 item occurred, and how and when it was corrected. He testifies:

"Q. Your mother, in her testimony, referred to a discrepancy in the accounts of a double charge of $1,174, which she had mentioned as having occurred after she came to look into your father's accounts. Will you state the circumstances connected with that, and in what manner that occurred? (R. 265.)

A. I had always been in the habit of rendering accounts to my father—not monthly accounts. There was a time when he said he did not want any accounts at all. He had such confidence in me and he felt grateful for what I had done, and he said when I came here to Washington, You will save the money out of the income and pay the mortgages, and I don't want any accounts from you; it will be your doing. After that he became more particular. I think I went a year without accounting to him for anything. After that he become more particular. Sometime I would account to him every two months, or every three months, and it was only in the latter years of his life that I accounted to him with any regularity, monthly. Finally I got to account to him monthly. I was always in the habit of rendering accounts to him, and the only vouchers I would produce would be the checks. He never asked for any receipts. I only mention this to show how this mistake occurred. I would sit down at his desk with him and we would go over the accounts together, and he would check off the checks and give them back to me. I

settled with him in the middle of February. That was the last settlement I had with him for the January collections, and I gave him a balance, I think, of $1,100 and some dollars in a check dated, I think, February 12th or 13th, somewhere in that neighborhood. I did not settle with him at all after that. He dies on the first of May, and when he died I was indebted to the estate, or to the executrix, I am not certain which—at any rate to the party to whom I should account—for the months of February, March, and April, and when my bank book came back from the bank with the vouchers in it, among these vouchers of February was this check of $1,100 and some cents dated February 12th, and I inadvertently charged it in the February account. The first I knew of it was when Col. Totten sent for me. He said, Haven't you made a mistake? I said, I don't know, perhaps I have. He got the account out and looked at it, and I told him I would go home and see whether I had two checks of $1,100 or whether I had one, and if — had made a mistake I would correct it. I looked and found I had one. I went to his house that night with the check and showed it to him. (R. 265.)

Q. To Col. Totten's house?

A. Yes; Col. Totten's house. We had a pleasant talk, I remember. I asked him what I had better do; how I had better correct it. He said, give them credit for it in the next account, which I did. That is all there is to it. (R. 265.)

Q. Was the Colonel satisfied with that mode? (R. 265.)

A. He seemed to be. He did not object to it. (R. 266.)

Q. You followed his suggestion?

A. I followed his suggestion. I took it around to ask him what to do. He suggested it, and I told him I would do it. (R. 266.)

Q. Can you fix the date precisely of that interview with Col. Totten?

A. No; I can't remember the date. (R. 266.)

Q. How shortly after your father's death was it?

A. I suppose it was somewhere along in May. I am not sure. I am not certain of that. R. 266.)

Q. It was prior to the time that the house 629 E street was finished?

A. Yes. (R. 266.)

Q. Then it was during the time that you were disbursing large sums of money towards the payment of that?

A. Yes. (R. 266.)

Q. The receipts at that time necessary were subject, I suppose, to the charges that were being made on account of repairs to that property, which were large, as I have understood you to say, amounting to several thousand dollars. In the disbursements on that account were amounts paid out which would require as much as $1,174.

A. Yes; and more." (R. 265.)

So that the mistake in the agency account, in which the item of $1,174.60 was wrongly entered as a credit, occurred thus: William May, as agent for his father, had been accustomed to render monthly accounts of his collections and disbursements. This accounting, however, had remained suspended during the last three months of his father's life, owing to the illness of which he died. When, after his death, his son came to state this account, commencing with February, 1891, which was the first month open, he inadvertently credited himself with the amount of a check which he had given to his father in that month, but which in reality represented a balance due him on a previous month's collections. This mistake was immediately noticed and corrected, credit being given in the May account of 1891, which was the mode required by Mr. Totten, to whom Mrs. May referred the matter as her counsel. And, therefore, this must be regarded as having been finally settled. But the whole transaction was *res inter alios*—relating to the unsettled account of his agency—antedating his father's death, and, of course, the trusteeship.

Between pages 336–342 of the record is set forth an account of William May as trustee, showing the *large*

amount of his receipts and expenditures from May, 1891, to December, 1893. At the top of page 341 is given the total receipts and expenditures during this period, as follows:

"Total receipts.....$42,116.02
Expended for estate..... 18,389.34

Net income.....$23,726.68" (R. 341.)

and of course the receipts and expenses were about the same in the testator's lifetime.

Mr. Justice Hagner, a painstaking and conscientious judge in the investigation of facts, speaking of *all* the charges of fraud and irregularity set out in the cross-bill, in his opinion, says:

"I decline, therefore, to decide that the alleged irregularities and inaccuracies in the accounts of William May, testified to by the witnesses, are evincive of any *moral* delinquency." (R. 380.)

As we have shown, the scheme to remove William May was formed in May, 1891, about three weeks after the testator's death, and the excuse for it was the error in the item of $1,174.60. But the scheme could not be carried out immediately, for the assent of Frederick May, one of the children, was necessary, and he was in Valparaiso, Chile, South America. (R. 239, 193.) He went to Chile in 1888 (R. 195) and did not return to the United States until about September, 1893 (R. 193), when he came to Washington and resided with his mother. (R. 193.) While he was in Chile, and on the 2d of July, 1891, two months after his father's death, he executed a power of attorney to his mother authorizing her to perform any act necessary to be done to protect and care for his interest in his father's

estate, and empowering her to sell or transfer any property to which he was entitled, and also to use any moneys in settlement of incumbrances against the estate. (R. 193; Exhibit W. H. S. No. 9, R. 239.) On the strength of this *limited* power of attorney his mother actually undertook to sign, and did sign, the "deed, declaration and resolution" of removal set out at pages 34–36 of the record *as his attorney in fact.* (R. 36, 193.) *The resolution of removal is a mere nullity*, and our 15th assignment of error (*ante*) ought to be conclusive of the case made by the cross-bill. Mrs. May had no shade of right to sign the resolution of removal as the attorney in fact of William May, and William May could not *ratify* Mrs. May's act afterwards, as he attempted to do by the paper dated May 8, 1893, and set out at page 72 of the record, *after the cross-bill was filed.* The cross-bill was filed March 7, 1893. (R. 48.) In our opinion, this power of attorney was not fairly obtained, whatever Frederick May may have afterwards said or done. *All the authority given by the power had already been conferred upon the co-trustees under the will, so its execution was needless.* When Frederick May left the United States in 1888, he and his brother were devoted to each other. The beneficiaries did not know he would consent to the removal, so the power was couched in general terms; *and he signed the power without the slightest idea that it was to be used as an instrument to effect the removal of his brother.* He testifies:

"Q. I ask you whether you contemplated, under the power of attorney as drawn there *in general terms*, that there was to be the exercise of any such power as the impeachment of your brother's fitness and ejecting him from the trust.

A. Let me see——

Q. I mean did you give the power of attorney with any such purpose or idea?

A. *I don't think at that time I could have done it.* That date was July, 1891, was it not?

Q. Yes.

A. *I could not have done it,* because there had been no legal trouble then. It had not come up at that time. This was two months after my father's death, and it was necessary to administer the estate. *I simply gave my mother a general power of attorney to do as she saw fit. I could not have done that, because there was no litigation going on.* This was two months after my father's death.

Q. Of course it could not have been your idea to give your mother power to eject your brother?

A. *No;* I gave another one for that.

(The witness refers to the attempted ratification dated May 8, 1893, and set out at page 72).

Q. I understand that fully.

Q. Mr. May, in the course of your previous life, were or were not the terms that you were upon with your brother those of love and ordinary brotherly attachment?

A. Most undoubtedly, sir.

Q. Not disturbed by anything?

A. Once in a while we had a little tiff.

Q. Nothing about business?

A. We had no business together at any time.

Q. You saw nothing of him in relation to the business affairs of this estate, being absent in South America?

A. I was absent in South America.

Q. And you know nothing except what you have been told?

A. No; but I have been corroborated in my power of attorney. My opinion has been strengthened by the way I have heard him speak since on one or two occasions." (R. 196.)

It does not appear who drew the power of attorney, but is it not reasonable to assume it was sent by mail to Frederick May about May, 1891, when the scheme of removal was made? It was executed July 2, 1891, and (according to the postmaster) it takes 37 days for a letter to go to Valparaiso.

William May's management of the trust estate has been wise and beneficial.

John A. Baker, a prominent citizen, and one of the leading business men of Washington, testifies:

"I think I have had such experience as will enable me to speak in reference to matters connected with the management of real estate in Washington. (R. 307.) I know William May. I have had an opportunity of observing his general conduct in the management of the real estate which devolved upon him as trustee. (R. 308.) I have very grave doubt whether there is a man within my acquaintance who could have managed this estate as he has. (R. 308.) My observation of his course, in respect to the management of this estate, has been that the earnestness he has applied to it would have been indicative of a sole owner. In fact, I have said to him, Why do you worry yourself and work yourself to death about these matters—I said substantially this—because you have only a sixth part of this estate? (R. 308, 309.) But he has devoted, as far as I have seen, all the enthusiasm that I would have done if it had been my estate, and, I think, perhaps more. (R. 309.) I think no one could have been selected as trustee who would have acted more faithfully and with more fidelity and success." (R. 309.)

Richard K. Tyler, a prominent real estate broker, testifies that William May has discharged his duties as trustee with efficiency and promptness. (R. 314.) "I unhesitatingly pronounce him to be a man thoroughly qualified for the position he occupies as trustee." (R. 315.)

Francis H. Smith, president of the Union Savings Bank, and a dealer in real estate, testifies:

"I have known William May since 1884 or 1885 (R. 303); I knew his father for a great many years (R. 304); my firm were tenants of the testator for 5 or 6 years, at 1222 F street. Our relations during that time were prin-

cipally with William May, representing his father. His father always spoke of him as having confidence in his management of his property. (R. 304.) I think before the testator died, or perhaps about that time, we used to be tenants of 1222 F street, and within the last year the Union Savings Bank became the tenants of that building, so that I am personally there at this time as the chief officer of that corporation in tenancy of the premises. (R. 305.) I pay rent to William May. The opinion that I have formed is that he is a very careful manager of the house property of which he had charge, and I suppose of which he has charge. The only criticism that I have ever made, or have heard other tenants make, was his inclination to too much economy in the repairs and improvements requested by tenants. (R. 305, 306.) My opinion is that he is administering the property so as to receive from it the most rent that can be obtained." (R. 306.)

The testimony of Thomas J. Myers, who was the agent of the testator for renting his estate in Washington and collecting rents from 1877 to 1882, when William May took his place, is set out at pages 309–314. It shows that William May received an increased rental on some pieces of property.

The testimony of Edward M. Burns (R. 316) and Osceola C. Green (R. 317), real estate men, are confirmatory of the above evidence.

The testimony of Dr. William O. Baldwin (R. 300–303) requires *careful examination.* It confirms in part what has heretofore been said about the condition of affairs in 1882, and the sacrifices the testator made to provide an income for the family, and of the high opinion entertained by the testator as to William May's management of his property.

Mr. Perry, in his able work on Trusts, thus lays down the law (Sects. 276, 277, 3d ed.):

"It may be stated generally that if the conduct or circumstances of the trustees are such as to render it *very* in-

convenient, improper, or inexpedient for them to continue in the trust, the court will exercise its discretion and relieve them, and appoint others in their place, as where the trustees were incapable through age or infirmity of acting, or so disagreed among themselves that they could not act, or where co-trustees refuse to act with any of their number; in these and the like cases the courts interposed and appointed other trustees. *But if there is a controversy, the court will exercise a sound discretion. Mere disagreements between the trustee and cestui que trust will not justify a removal;* and if a trustee fails in the discharge of his duties from an honest mistake, or mere misunderstanding of them, or from a misjudgment, it is no ground for removal, and if a trustee in good faith refuses to exercise a purely discretionary power in favor of the estate, as to vary the securities, he will not be removed; nor will he be removed for a mere constructive fraud, as for buying the trust property at his own sale. Nor will a trustee be removed for every violation of duty, or even breach of trust, if the fund is in no danger of being lost. In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case. Further, the court has regard to the nature of the trust, and to those instrumentalities by which it can best be carried into execution. Accordingly, courts will not substitute trustees upon the mere *caprice* of the *cestui que trust, and without a reasonable cause;* and although the instrument of trust, or a statute, gives the *cestui que trust* full power to remove and appoint other trustees, *yet good cause must be shown or the court cannot be put in motion.* In no case will the court remove old trustees and substitute new ones, *unless satisfied of the necessity of the removal*, and of the fitness of the new trustee proposed."

Perry on Trusts (3d ed.), Sects. 276, 277.

In support of the principle above laid down, that mere *disagreements* between the trustee and *cestui que trust* will not justify a removal, Mr. Perry refers to the following cases: Clemens *v.* Caldwell, 7 B. Mon 171: Gibbes *v.*

Smith, 2 Rich. Eq. 131 ; and Foster *v.* Davies, 4 De G., F. J. 133. In the last case cited Lord Justice Turner says: "*It would in all cases, I think, of this description be well to enquire from whose dissension the cessation of friendly interest has arisen.*"

When it is said by Mr. Perry that where trustees have so disagreed among themselves *that they could not act*, courts have interposed and appointed other trustees, he means, of course, that the disagreement was such *as to defeat the execution of the trust*; but in the case at bar there is no pretence that the execution of any trust requiring *co-operation* by the co-trustees has been hindered, delayed, or prevented by the alleged disagreement. All the charges against William May relate exclusively to his management of the real estate, in which management he was *sole trustee*. Besides, the writer never meant to intimate that a trustee *not in fault* would be so removed.

When Mr. Perry says that courts have interposed when co-trustees refuse to act with one of their number, he evidently means that the trustees *refusing to act* might be removed.

Courts will not substitute trustees upon the mere *caprice* of the *cestui que trust* and without a reasonable cause.

O'Keefe *v.* Calthorpe, 1 Atk. 18.
Pepper *v.* Tuckey, 2 Jon. & La. 95.
Ward *v.* Dorch, 69 N. C. 279.
Bouldin *v.* Alexander, 15 Wall. 132.

Although the instrument of trust or a statute gives the *cestui que trust* full power to remove and appoint others, *yet good cause must be shown or the court cannot be put in motion.*

Stevenson's App., 59 Pa. St. 101.

The appellees rely upon the case of *McPherson* v. *Cox*, 96 U. S. 404. The opinion was delivered by Mr. Justice Miller. In it he says:

"Where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into *constant* personal intercourse with the latter, it may be conceded that the mere existence of *strong mutual* ill-feeling between the parties will, *under some circumstances*, justify a change by the court."

(The Chief Justice, Mr. Justice Hunt, and Mr. Justice Harlan dissented.)

This language of a majority of the court has no application to the case at bar. The "circumstances" do not exist to call the principle laid down into action. What evidence is there of *mutual* ill-feeling? The duties of William May, so far from requiring *constant* personal intercourse, do not require *any* intercourse.

II.

We now come to the charges against William May specifically set forth in the cross-bill and in the answers to the original bill, and in said "deed declaration and resolution," which are made a part of the cross-bill.

The charges of dissension, of the refusal of Mrs. May to have direct business intercourse, and of the error in the duplicated item of $1,174.60 have already been considered.

The remaining charges commented on by the appellees in their brief in the Court of Appeals are these:

1. Expenditures in converting the house, 629 E street, into a store, and not rendering full vouchers therefor.

2. The check to Vataline Horan, a nurse, where the matter in dispute is *sixty cents*.

3. Antedating a check for $120.50 to John P. Franklin.

4. An improper charge of $6.70 for stationery.

5. Alleged overcharge of $100, as paid to one Caball, a carpenter.

6. Claiming a fee of $1,000 to pay his counsel for conducting the *original* suit and *for defending the cross-suit.*

By the aid of an expert accountant the appellees claim to have discovered errors in William May's accounts, running through several years, amounting in the aggregate to $107.30, for it is conceded the $120.50 paid to Franklin was justly due to him. During this period William May's receipts as trustee were $42,116.02, and his expenditures for the estate $18,389.34. (R. 341.) But we will consider these six matters in their order.

1. Let us look at the complaint sought to be based on the rebuilding expenditures upon the property No. 629 E street, which is not fairly a subject coming under the trust, as shown in the evidence. But there is no deviation from duty and no disparagement to Dr. May's management, or cause of demerit, in what was done by him with it. It appears that his father desired the changes and alterations to be made, which were undertaken by his direction, and were under way when he died. The whole matter was left unreservedly to William May by his father. It was changed from a dwelling-house to a store, at a cost of $4,600; and it was left entirely to the discretion of the appellant. On page 263 of record we have the account of this transaction. Mrs. May has all the vouchers for moneys spent in this improvement. (Record, 299.)

Before the change, the premises were occupied as a boarding-house, hard to rent at $65 per month, and always trouble and always a row to get the rent. (Record, 264.) From being a poor piece of property it was rendered a paying one—paying, indeed, according to the testimony, 25

per cent. on the additional outlay. At all events, it is uncontradicted that William May had entire authority to undertake and contract for the improvement, and complete it, from his father.

2. There was a check which had been paid away to Miss Vataline Horan. When presented as a voucher, the figures were $42.60, and Mrs. May, whose testimony we will refer to first, on page 127, record, says that she was startled at it in *connection with things that happened subsequently*. She thought the check should have been for $42.

The matter in dispute here is 60 cents. Dr. William May paid a nurse $42.60, and his mother thinks he ought to have paid $42.00. This difference is made much of.

Mrs. Wright swears in her affidavit, Exhibit No. 1, to the cross-bill:

"A check dated April 30, 1891, to Vitaline Horan, a nurse, was paid at the bank as $42.00, but appears in the account as for $42.60, and this discrepancy has never been explained." (Record, 53.)

And the same statement is made in the joint affidavit of John Beavor Webb and Mrs. Randolph, filed with the cross-bill. (Record, 57.)

Mrs. May testifies:

"Q. I find in this same account for May a credit taken by William, the plaintiff, as of April 30, 1891, paid Vitaline Horan. She was the nurse. Was there any objection made to that item?

"A. Yes, sir; $42 is what he paid her.

"Q. What, as a matter of fact, were her wages?

"A. $21 a week.

"Q. And she had served two weeks?

"A. She had served six weeks. She had been paid, before that, $84, and then he paid her on the 2d of May. Her week was not up, but I said that he should pay her for

the full week. It was on the 2d of May that she was paid, the day after Dr. May's death. That is the check that I said was dated April 30th, and it was paid May 2d.

"Q. That is, it was handed to the nurse?

"A. It was handed to the nurse.

"Q. Will you look at this check which I now hand you and see if that is the check which was given to the nurse (exhibiting a check to the witness)?

"A. Yes, sir; I believe it to be.

"On seeing that charge of 60 cents on that check I was startled at it, in connection with things that happened subsequently, and I sent for Mrs. Horan and asked her what Dr. May had paid her. She seemed to be a woman totally ignorant with regard to accounts, and she said that she really did not know, but she supposed he paid her what the services called for, $42. I said, 'Did he not pay you any more than that?' and she said, 'No.' I said, 'Mrs. Horan, there is a charge of 60 cents, and I want to know if you can throw any light on that.' She said, 'Well, if it is on the check, of course I must have had it, I suppose.' She did not know at all about it. Dr. May was very anxious to get that check, and he sent me a receipt from Mrs. Horan and asked me to give him the check in return for the receipt, which I declined to do. (Record, 126, 127.)

"She [the nurse] never had the 60 cents, and I thought it curious what the 60 cents should be for. I know that her services were $21 a week. It struck me in looking at the check that there was a discrepancy of 60 cents. And that is all there was about it." (Record, 138.)

Mrs. Randolph says:

"I asked him if he would show me his bank account, and he said he would. He showed me his book, and I found the entry of this check for $42.00 without the 60 cents." (Record, 166.)

In November, 1891, Dr. William May wrote to Mrs. Randolph:

* * * "We also found the check drawn in favor of Vitaline Horan to be $42.60, with her endorsement on the back." (Record, 369.)

This was before the interview by her, testified to above. The nurse herself told Mrs. May:

"Well, if it is on the check, of course I must have had it, I suppose." (Record, 127.)

And Mrs. May swears that she failed to discover that there really was any impropriety with regard to the check for $42.60 when she inquired about the matter of Mrs. Horan. (Record, 139.)

This is the difference of 60 cents which so startled the defendants. Whatever the check was, Vitaline Horan endorsed it and got the money for it.

Dr. William May says:

"I recollect drawing a check in my mother's bed-room after my father's death to pay for her (the nurse's) services; but whether it was $42 or $42.60, it is impossible for me to state after this lapse of time. I have no recollection aside from the drawing of the check which enables me to state how the discrepancy occurred. After the dissatisfaction that she (Mrs. May) expressed at the appearance of the check, I made it my business to see Mrs. Horan and get a receipt from her for $42.60. I sent this to my mother. That was the amount that she actually received." (Record, 267.)

The theory of the complainants in the cross-bill is that the check was originally given for $42; and an expert, on deciphering doubtful papers and detecting alterations in them, testified:

"This check was drawn for $42. Then there is clearly a little analine splotch over one of the ciphers that prob-

ably came from contact with some other check that had been laid over it. Without putting the glass on it to show the color, unquestionably it would look like $42.60, but it is in fact $42, and it never has been altered in any way. The amount of the check given in the lower left-hand corner shows $42.60 with a visible point showing through, when put to the light, where there had been some possible and probable erasure; but I cannot see any erasure which would indicate that it had been a complete cipher. Unquestionably after that check had been paid and had been received again by the drawer of the check he, in looking over it for the purpose of identifying it and classifying it as a voucher, might have then thought that there was a discrepancy between the figures, so far as the 60 cents were concerned, and, thinking that some mistake had been made, might have made the '60' cents below to make it correspond with what he believed to be the true amount of the check. And it may be that after this check came back to Dr. May, he may have thought that it was '60 cents' and have made the 60 cents here to correspond with it." (Record, 206, 209.)

At farthest, then, there was no alteration. If the check originally had written in its body $42.00 and in its corner $42.60, or if the check had written in the body $42.00 and the 00's became blurred and caused the doctor afterwards to fill in in the corner $42.60, in either case there is no charge against him. At the very worst, it is a mistake any one might have made.

3. Then there was a second check drawn for $112.50, dated 30th May, 1891, which was passed in due course to, and received by, the payee, and by him drawn, but because of an alteration of the date, excited Mrs. May's suspicion.

As to this Franklin check. Dr. May is charged also with altering the date.

In her affidavit to the cross-bill, Mrs. Wright says:

"When held up to the light it shows that its date, some

time in June, 1891, probably the 7th, has been scratched out with a knife and 'May 30' written in, so as to antedate it and make it a voucher in the statement for May, 1891." (Record, 53.)

And the same is charged in the joint affidavit of John Beavor Webb and Mrs. Randolph. (Record, 56, 57.)

Mrs. May says:

"This [Exhibit S. H. M. No. 1, Record 253] is the check and this is the condition it was in when I first saw it. My objection to that check is the erasure. The date has been erased. Whatever was there before has been erased and May 30th has been put there. On its face it appears to be regular. I know positively from my son that he had been down to John Franklin's on that day in June and paid him. That is what vitiates that check."

"Q. That does not touch the face of this check as a voucher to him, for he paid the money. What was there about that check that roused your suspicions that dishonesty had been practiced?

"A. That date of May had been changed; that is all. It has been erased, and I knew that he had been down there in June.

"Q. Do I understand you to say that you subsequently discovered that Mr. Franklin did not receive this amount of money?

"A. No; but he did not receive it on that day, and the change of date was for the benefit of my son in making up his accounts. That is what the change was for and that is what the whole thing hinges on.

"Q. That is all you can say about it?

"A. Yes, sir." (Record, 126, 139, 140, 141, 142.)

Blackford testified as to the erasure, which is perfectly apparent, and said he thought there had been a J where the M was in the date of the check. (Record, 205.)

So much for this charge. It is clear that there was an erasure in the date of the check, but what of it? An

erasure means nothing of itself and they prove nothing else.

Mrs. Randolph says:

"I told him [William May] of this thing and said it was a very grave charge. He did not seem to think it amounted to anything." (Record, 166.)

Let us see what William May says about this check. He testifies:

"I recollect the indebtedness for which this check was given. I can tell you exactly what it was given for and the date on which I gave it. It was paid to Mr. Franklin on the 30th of May for $112.50, interest on the house 2022 G street, on money that my father borrowed to pay off his debts in New York. John Franklin was the mortgagee of property belonging to the estate. He loaned his money to my father and this was the semi-annual interest, $112.50. I paid it to him on the 30th of May. I delivered the check and received a receipt (Exhibit S. H. M. No. 1, Record, 331) from him at the same time. I have furnished a receipt. I don't know how long Mr. Franklin carried the check after I gave it to him. My recollection is sufficiently distinct to enable me to state that that check was drawn and delivered to him on the 30th of May; I will swear to that. I recollect upon seeing the check here that there was an erasure upon it. It looked as if the date had been erased. I don't recollect how that occurred, but it is possible that I may have drawn the check up and put the wrong date in. I don't know, but it is possible that I wrote that check June 10th or 12th, whatever they say it is, and after I drew it and filled it out I saw that the date was incorrect. It is possible that I erased it and wrote May 30th in there. The check was delivered on May 30th. The receipt was received from John Franklin on May 30th, in accordance with the date of the check. I sent Mrs. May a receipt of that sort and I have an additional one here. In addition to the check I had a receipt, bearing date the 30th day of May, from Mr. Franklin. I had that

receipt here amongst the papers. It is not true that I paid him the money in June." (Record, 267, 268, 269, 281, 287.) Receipt (Record, 331).

Mrs. May's charge, moreover, that the alteration of the check was for William May's advantage in making up his accounts, appears the more ridiculous when we observe the wording of the check, "Interest to May 1st, 1891." (Record, 253.)

4. The appellant is also charged with charging against the estate an item of $6.70 for stationery.

Mrs. Wright says:

"I remember finding a charge for having paper and envelopes stamped in an account. I remember it perfectly. I went and asked Woodward & Lothrop what the paper was, and I received a statement from the clerk, who said that Mrs. May had ordered it. It was fancy, suitable for a lady and not suitable for business purposes, and was marked with the number of the house on 17th street; that was charged on one of the accounts against the estate. (Record, 156.) I went to Woodward & Lothrop because it was an unusual thing to have paper charged in any of the accounts. It was an item of $6.70. I had not seen the paper. The paper was marked with the number of the house at which Dr. May lived, No. 818 17th street." (Record, 162.)

It is to be observed that no witness testifies that this paper was ever used for anything but business purposes. No one says that Mrs. William May ever used any of it. As to whether or not the kind of paper was suitable for business purposes is a question of opinion, and Dr. May followed his judgment in the matter.

He says:

"I supposed a trustee was entitled to stationery, and acting upon that idea I ordered, I think it was, $6.70 worth of stationery at Woodward & Lothrop's. I had the number

of my house and street put on it. I had a large number of tenants at that time and my house was my office. It was the only office I had for the transaction of the business of the estate; always at the house. The paper bore the engraved stamp—the street and the house—818 17th street. It was that paper I thought I would need to carry on the business of the estate in correspondence with the tenants. I required and do require considerable amounts of stationery. I supposed this to be one of the expenses of the trust. That is the reason I did it. I don't know what the law about it is, but I have heard of trustees charging stationery, envelopes, and stamps, and everything of that kind." (Record, 269.)

5. As to the charge of having credited himself with having paid Cabell, a carpenter, $350, when the actual payment was $225—an overcharge of $125—mentioned in the affidavit of Mrs. Wright (Record, 53) and the joint affidavit of John Beavor Webb and Mrs. Randolph (Record, 57), and testified to by Mrs. May (Record, 125), and stated by her to have been an overcharge of $100 (Record, 53, 238), William May denies this on belief, and says that if any such overcharge did occur it had been corrected by Mr. Norris, who had been all over Dr. May's accounts and made out the account for the court. (Record, 294.)

From these petty minutiæ one thing is certain—that no pains were spared by the appellees to put the worst face upon Dr. William May's conduct. That they should only have been able to produce such insignificant inaccuracy argues the generally unexceptionable character of his management, and serves to exonerate him from serious deviations and irregularities.

Does not all this forcibly suggest to the judicial mind that it was not until it was determined to remove him that the past was ransacked for the discovery of some pretexts to aid in that object?

6. As to the objection made to payment of the solicitors who have had charge of the interests of the estate, and of all proceedings including the conduct of this cause as an instance of incorrectness on the part of the appellant, we need only say that filing of the bill was a step undertaken under the fullest advice of counsel, as has been shown. We apprehend that there can be no room for controversy as to the right of a trustee, situated as the appellant was, to secure professional assistance for the benefit of the estate; and in his own behalf as trustee to seek the protection and indemnity of the court. And as to the right to employ solicitors by trustees, we may cite the following authorities:

Hill on Trustees, 570 and notes, 572–3 and notes, and 548.

Lewin on Trusts, 634–5, ch. 24, sec. 2.

It is fully recognized by the Supreme Court of the United States in a series of decisions:

Ex parte Plitt, 2 Wall, Jr., 453.

Trustees *v.* Greenough, 105 U. S. 527, 533, 537.

In re Paschal, 10 Wall. 483.

English cases—

Low *v.* Carter, 1 Beav. 426.

Greenwood *v.* Wake, 1 Beav. 582.

1 Maddox's Ch. 393.

Johnson *v.* Tilford, 3 Russell, Ch. 477.

In Maryland the law is clear, that the trustee will be allowed such reasonable fees as he may pay without previous order.

Brady *v.* Dilley, 27 Md. 582.

Druid Park Heights *v.* Oettinger, 53 Md. 63.

The Maryland Court of Appeals says in this case: There are occasions and circumstances when a trustee must exercise a discretion, though none is given by the instrument creating the trust; otherwise great loss may happen to the estate, or a great opportunity may be lost by delay. Hence the rule has been adopted in equity that a trustee may do that, without a special order, which the court, on a case made, will order. Citing--

Perry on Trusts, sec. 476.

Hatton *v.* Weems, 12 G. & J. 83.

And in Northern Central Railway Co. *v.* Keighler and others, 29 Md. 579, Bartol, Ch. J. of same court, says: "The power of a court of chancery to take jurisdiction of a *conventional* trust and direct its administration is unquestionable, and an application for that purpose by the trustee or a party in interest ought not to be refused where there is any difficulty or *complication likely to arise in the execution* of the trust, or any question of *dispute as to the powers* or duties of the trustee or the rights of the parties beneficially interested in the trust."

But this case is stronger—the codicil conferring power by the use of the term "expenses," generally—to incur such an expense as counsel fees. It seems indeed plainly to be one of those cases in which Judge Story declares it to be "indispensably necessary" to obtain judicial sanction and indemnity in the performance of his duties by the trustee. And we may add that what may prove to be eventually the views entertained by the court do not furnish the criterion, either, of his course. The "large questions" arising for adjudication in the case, and "various important questions growing out of the will" (Record, Opinion, page 382), sufficiently demonstrate that the jurisdiction of the court was most properly invoked—the counsel esteeming

very highly the favorable mention which the Justice at the outset of his opinion was pleased to make of their effort in presenting those questions in their argument. As to them, it is a case which has entailed great labor and incessant attention, and they have received no other compensation than the above-mentioned fee.

III.

We respectfully maintain that, under no circumstances, will the court suffer the expulsion of the appellant from the trusteeship before action in the usual course of the court is had upon his account, for the reasons not only presented already, but because the trustee's bond could not be sued before the auditor's report; because trustee, as an officer of the court, has a claim to its protection and indemnity which involves his right to authenticate it; because the attitude of the parties has been materially changed, since (no attempt to remove having been made prior to the institution of the suit) the court has acquired jurisdiction of the trust for all purposes; and because the court ever affords fair opportunity to correct, even had there been made mistakes of the description urged against the appellant in these proceedings.

Jones *v.* Stockett, 2 Bl. 435.
Webb *v.* Shaftesbury, 7 Ves. 487.
Hill on Trustees, 557.

IV.

As to the question arising upon the 8th assigned error. This is whether Mrs. May could rightfully claim to be paid one-third of the gross receipts of the trust estate from the testator's death without deduction first being made of the

interest payable upon the mortgages upon the trust property, which were not extinguished until about two years afterwards.

Mrs. May insisted on such a right; and she has received her share in this way. The difference between the two to modes of paying her will be found, when the account comes be stated by the auditor, to amount to upwards of $1,200.00, which, if our view be correct, had been overpaid her. Justice Hagner, in his ruling, sustains her claim so made. But whether we consider the testator's intention upon the phraseology of the will, or the rule applicable to the division of such expenses between life-tenant and remainderman, we think that construction cannot be maintained.

The 2d paragraph of the will provides as follows: "As it is my wish to make at least the same provision for my wife to which she in law would be entitled under her right of dower, I will and direct that she shall receive one-third of the net annual income of my estate derived from the rents, profits, and issues thereof during her life," &c. The testator had created a trust for the payment of the mortgage indebtedness, as well as for paying this share to his wife; and what, as it seems to us, is meant by directing her to to be paid one-third of the net annual income was the clear income after the interest on these encumbrances had been met.

Whilst it is not precisely a question between life-tenant and remainderman, yet there is here such analogy to it that, in reason, the rule applicable to those interests should be followed; a rule very well settled, and which in a late case, Barnes *v.* Bond, 32 Beav. 653, the Master of the Rolls, Sir John Romilly, after a number of the more recent decisions had been cited in argument, stated to be that, as between tenant for life and remainderman, the interest on the testator's debts must be borne and kept down by the income as from the day of his death.

AS TO THE ORIGINAL BILL AND THE QUESTIONS ARISING UPON THE CONSTRUCTION OF THE WILL.

From the inspection of the will and codicils, in connection with such circumstances as are germane to the enquiry, its legal effect and operation may be ascertained, and the court be enabled to judicially determine and pronounce in what manner the large estate of which the testator died seized is to pass and to be held and enjoyed by the parties to this proceeding, who are not only his devisees, but also all his heirs and representatives. It will be observed that the legal heirs and the devisees are the same persons.

Four out of the six surviving children had married in the lifetime of their father, of whom three had had children born prior to his death, and one subsequent; and neither since the date of the will nor since testator's death has any of his children died. The family membership stands as it did—unchanged—during the period subsequent to the date of his will and codicil. More than a year ensued after the interval of the date of the will before signing the codicil on March 27, 1891; and hence to this later signature is to be attributed the credit of the more consummate and more deliberate act; and it clearly evinces a change of mind with regard to the execution, or mode of performance, of the trusts created by the will, the court noting, as it must, that the codicil was drawn but for this single purpose. It had no other object.

Several questions are presented, but by far the most important is as to the quality of the estates or interests devised to the testator's children; and the nature, extent, and duration of the trust sought to be created by the will. The absence of any provision disposing of the ultimate interest,

or remainder of the realty after being given to the children; or requiring the performance of any active duties by the trustees after payment of the liens, and after Mrs. May's death, when her equitable life estate in one-third of the estate falls in; and whether the fee has vested absolutely in the children, or whether they merely take an equitable life estate, are points involving, necessarily, a judicial construction of the instrument. And our contention is that upon the death of the testator the equitable fee in the realty of which he died seized, and which is devised by the will, vested absolutely in his children, under the terms of the devise of rents, issues, and profits, subject to the well-declared trusts for payment of the mortgages; and for Mrs. May's share of the income during her life. And this results because it is settled, as we think, that where property is given to a trustee and his heirs, in trust, to pay the income to one for life, and after that event to hold the same for the use of children—heirs—or other persons, the trust ceasing, for the reason that it remains no longer an active trust, the Statute of Uses immediately executes the use in those who are limited to take it after the death of the life-tenant.

Perry on Trusts, section 320, and notes.
Ware *v.* Richardson, 3 Md. 542.
3 Jarman on Wills, 52.
Laurens *v.* Jenney, 1 Spear, S. C. 336.

It must be remembered that the same rules govern the construction in cases of equitable and legal interests.

In the will, no words of perpetuity are used in the devise to the testator's children. But neither is there any gift over or limitation of the estate *to any one whatsoever but them;* and with their mother, who takes an equitable life interest of one-third of the income, they are the sole bene-

ficiaries. Mrs. May was given one-third of the personalty, absolutely, and one-third the income, and dwelling-house for life. There was no mention of life estates as to children.

As will be seen, so far as it employs language affording indications of the testator's intention beyond providing for payment of debts, the whole instrument is confined to a disposition exclusively of the *income of his estate*—its rents, issues, and profits, and it is, undoubtedly, an inartificially drawn will, and not the production of one conversant with the preparation of such instruments. We cannot affirm that it is inexplicit, so far as it goes, but in its terms and dispositions it certainly is silent as to the corpus of the estate. And yet the testator, as is submitted, must be considered to have resorted to a form of gift and devise to which the law, by the received rules of construction, will give the effect of disposing of his property because he has manifested an intention not to die intestate, and as the legal result of the expressions he uses.

He provides for his children as his only named beneficiaries, subject to the payment of his debts and his wife's interests, with a restriction, it is true, but with a restriction which will be rejected as void.

By giving his "entire estate," in the first paragraph of the will, to trustees, to receive the rents, issues and profits, and to apply, as provided, although creating for some purposes a trust, and although accompanying such devise with the prohibitory proviso, he gave all his interests in the subject. And the devise was good, whilst the condition was not. A prohibition upon partition is a restriction inconsistent with the rights inseparable from property, as it is a restraint upon alienation, and is void.

And whatever the children take as beneficiaries, they take free and unfettered from all conditions. A gift of

rents, issues and profits—income—net income, all mean the sam thing and have a fixed legal signification.

These the testator gives to his children, and then superadds the restriction that they are to keep the estate intact. And while, no doubt, we may perceive an earnest wish on his part that the children should grow richer by holding on to their patrimony, which he expected to increase in value, he manifests no intention that such a result should be attained at the cost of stripping them of those other incidents necessarily connected with the title, namely: capacity to transmit to those who come in their stead, with natural hereditary and marital claims and dependencies—testamentary power; in short, full ownership and control, short of selling.

Having declared, at the outset, the purpose to dispose of his entire estate, real, personal and mixed, he does this substantially—not by the use, it is true, of the most technical terms—but after providing for immediate claims, then to his wife for life, and then to his children generally.

To reform the will at the expense of all the essential attributes of the devise so made could not be done except by cutting down the interests thus bestowed upon his children to life estates, which would be impossible under the frame of the will. That would be without warrant, and would be to make the will speak on a subject upon which it is silent. No court would ever permit that to be done. Had the testator been minded to give but life estates, it behooved him to make such partial disposition unmistakably clear and distinct. But even if the court is reduced to the alternative of holding that, after protesting solemnly his purpose to make a disposition by will, there is an intestacy as to the principal or corpus, then the heir must inherit. It may possibly be that the testator would have altered the instrument to the extent of giving only life estates to his chil-

dren if he had been informed that his attempt to restrict and control their power in dealing with their property could not be accomplished as he had apparently designed. This, however, would be but a guess—would be doubtful even beyond conjecture.

We are to take the devise couched in the peculiar terms in which we find it; a gift of "the rents and issues and profits of his entire *estate*," and to pronounce what species of interest the children of the testator are to receive under it. And this is to be determined by ascertaining—not so much the supposed actual meaning—but, as it has been called, the legal meaning of the words used. Chancellor Kent has observed that courts are sometimes obliged to say: "*Sic voluit, sed non dixit.*" The intent must be gathered, not from what the testator intended to say, but from what he did say—his words.

Chamberlain *v.* Owings, 30 Md. 454.
4 Kent, Com. 535–38.
Clarke *v.* Smith, 49 Md. 106–117.

Three aspects are presented under which the construction of the will may be considered:

1st. Of the opinions first entertained by counsel regarding its legal operation, there were some who inclined to think that, as the corpus or principal of the testator's property had not, in terms, been disposed of, it had descended as in intestacy. This, of course, was upon the theory that there was but a naked general devise in favor of the children, which would confine their interest to that of life estates, according to the old rule of law; but that the children named as such devisees, being also the heirs of their father, they must take the inheritance and the absolute estate by merger.

2d. But although the property and estate of the testator

is given without words of inheritance, nevertheless the testator has employed terms by force of which the beneficiaries will take in as full and ample a manner as if the will had limited it to the devisees and their posterity forever by more technical words. It is, moreover, a case where the gift, if it is considered incomplete, will be enlarged by implication into a fee.

3d. If the court, however, should not assent to the foregoing propositions, then, as the gift was upon trust with the limitation of the legal estate to "trustees, their heirs and assigns," but no limitation of the trust estate beyond the direction that the trustees and their heirs and assigns should hold *the estate* for the six children of the testator—the only named beneficiaries, with no ulterior interest contemplated—then the children must take the equitable fee, for it is supposed in such a devise to be the intention that the beneficiary shall take an equitable estate as large as the legal estate that passed to the trustee and his heirs.

To sustain these views, we will briefly state our reasons and the authorities to be adduced to their support in the aforegoing order:

First. If it should be considered that only life estates passed under the will, if by any course of reasoning it could be propounded that the gifts to the children must be construed as of any less quantity than the inheritance, it must of necessity be held that their interests were but for life, and hence that there was an intestacy as to the remainder, and then the only conclusion possible and consonant to established principles would be that the *corpus* had vested, subject to the purposes of the well-declared trusts, in the heirs of the testator.

4 Kent, 100, 101 (Marg'l p.)
Preston *v.* Evans, 56 Md. 486.
2 Black Com. 177.
Laurens *v.* Jenney, 1 Spears R. 365.

The case of Hobart *v.* Countess of Suffolk, referred to in Hill on Trustees, 113 (2 Vernon, 664), which was an early decision, is cited as establishing a resulting trust in favor of the heir where life estates were disposed of, but there is no disposition of the remainder. The operation of the principle is seen in those instances of partially disposed of estates, such as gifts upon a contingency and no disposition of intermediate or ulterior interests.

Nash *v.* Smith, 17 Ves. 29.
Chambers *v.* Brailsford, 18 Ves. 675.

But as the testator says he gives his entire "*estate*," this construction is too narrow. For, in view of the expressions and thoroughly well-settled legal exposition, the devise to his children is one where the doctrine of enlarging the estate by implication to a fee would apply.

Lambert's Lessee *v.* Paine, 3 Cranch, 133.
Shreve *v.* Shreve, 43 Md. 406.
Monnett *v.* Dougherty, 5 Gill and J. 459.
Chamberlaine *v.* Owings, 30 Md. 447.
2 Redfield on Wills, page 288.

Cases which without the word heirs will carry a fee:

4 Kent Com., pages 535–539, and notes (marginal paging), 540–1.
Elton *v.* Shepherd, 1 Bro. C. C. 532.
Challenger *v.* Shepherd, 8 Term, 597.
Frogmorton *v.* Bramstone, 3 Burrows, 1618, 1622–1898.
Adamson *v.* Armitage, 19 Ves. 418.
1 McCord, 71, Carr *v.* Porter.
Cassell *v.* Cooke, 8 Serg. & R. 289.

The use of the words "entire estate" or "estate" carries the fee by necessary implication. It is settled by an unin-

terrupted series of decisions that the word estate in a devise is equivalent to words of limitation.

2 Black Com. 103.

5 Mackey's Repts. 443, Snyder *v.* Baker.

And it is to be noted that, while a will is to be construed as an entirety, we cannot control the legal construction of one section by guesses at the intent arising from the disposition of his property in the remaining sections.

2 Roper on Leg. 1482.

The provision as to the share of a deceased child, in the fifth clause, was but "substitutional;" and the event of a child's death, as we think, is clearly to be referred to the lifetime of the testator. But the use of the word trust or trustee does not in all cases create a trust; and if upon well-known rules for vesting estates it will be seen that the children's estates vested upon testator's death, and as all of the children survived him, no question as to the interest of any grandchild can occur.

Secondly. The gift of the produce—the rents, issues, and profits—is a gift of the principal of the estate. In this instance it is doubly so, because the testator starts out by saying that he is about to dispose of his entire estate (1st item of will), and after designating the two classes of objects of the trust,—viz: payment of his debts and relieving the estate of encumbrances, with powers relating to the mode by which this was to be done; prescribing, in special circumstances, for a sale and reinvestment, but with no disposition of proceeds of parts of the trust estate, he provides for his wife, and then, in sweeping terms, the testator gives the rents, issues, and profits of everything he owned, ten or twelve very valuable pieces of real estate, yielding from $12,000 to $15,000 income per annum, generally,

without words of perpetuity; but, as said by Judge Eccleston, in "Casilly *v.* Meyer, 4 Md. 11," in passing upon this exact question, "disclosing no intention that the principal shall be preserved for the ultimate benefit of any other persons" than his children.

He mentions everything possible to pass in bulk, naming no one particular child; separating no one parcel or piece of property from the rest. He does not even interpose trusts for his married daughters, nor provide for a child's death without issue; and, as has been stated, the testator had, at the date of his will, six children, four married, and three of them having children, a number of whom (grandchildren) were born in his lifetime. There is no recognition whatever of the grandchildren, as individuals or as a class. The rule by which the gift of the rents, issues, and profits, in legal acceptation, will transmit the fee to the recipients, is incontestably settled.

4 Kent, 536, &c.
Hawkins on Wills, page 120.
Lovett *v.* Gillender, 35 N. Y. 617.
Earl *v.* Grimm, 1 John, Ch. 499.
De Peyster *v.* Michael, 6 N. Y. 467.
Reed *v.* Reed, 9 Mass. 372.
Hall *v.* Tufts, 18 Pick. 460.
Stewart *v.* Garnett, 3 Sim. 398.
Newton *v.* Reid, 4 Sim. 141.
21 Pick. 42.
Phillips *v.* Chamberlain, 4 Ves. 51.

If, as we insist, the active duties of the trustees cease with Mrs. May's life—for the trust is to appropriate the income of the entire estate after that event—then, for the reasons already stated, the equitable estate terminates too, and the children can call for the conveyance of the legal title.

Perry on Trusts, 312, 320.

Long *v.* Long, 62 Md. 65.
Warner *v.* Sprigg, 62 Md. 20.
Smith *v.* Clark, 49 Md. 106.

Being thus invested with absolute ownership, *all restrictions contrary to the nature of their estate would necessarily be void.*

4 Kent, Com., 131–32, 536.
Smith *v.* Clark, 10 Md. 18.
Casilly *v.* Meyer, 4 Md. 1.
Lovett *v.* Gillender, 35 N. Y. 17.
Brown *v.* Fairfax, 60 Md. 50.
Lane *v.* Lane, 8 Allen, 350.
Stansbury *v.* Hubner, 73 Md. 228.
Earl *v.* Gwinn, 1 John, Ch. 494, etc.
3 Kern N. N., 273.
7 John, 220.
38 Barb. 409.
Newkirk *v.* Newkirk, 2 Caine's Cases, 346.
Snyder *v.* Baker, 5 Mackey's Rep. 443.

But not only will the restriction on absolute ownership be rejected, but where an absolute gift is made in the first instance, repugnant expressions or clauses will not have the effect of reducing or cutting down the devise to a life estate.

Elton *v.* Shepherd, *supra*, 1 Bro. C. 531.
Brown *v.* Fairfax, 60 Md. 61.

Judge Stone here says: "After giving an estate in fee to his children (and there were no words of inheritance there) the natural and primary objects of a parent's bounty, it would not be a fair presumption that he intended to reduce the estate to an estate for life."

8 Paige, 498.
Coombs *v.* Coombs, 67 Md., p. 11.

1 Hilliard on Real Property, 91.
Ide *v.* Ide, 5 Mass. 500.

Hence, notwithstanding the indications of the testator's desire to keep the property tied up by means of the trust, to accomplish the restriction imposed, and to last for the lives of his children, the case falls within the language of Lord Mansfield in 3 Burr. Rep. 1618: "Every testator has probably formed some general plan which is often barred by rules of law." And as declared in Smith *v.* Clarke, 10 Md. 186, the difficulty is that the testator has attempted to do what the law does not permit him to do.

In Stansbury *v.* Hubner, 73 Md. 230, Judge Irving, speaking for the Court of Appeals, says: "It was an attempt to do that which the law will not permit to be done." "He undertakes to prescribe the way in which his property was to be enjoyed by the holders thereof"—citing 4 Kent, p. 131, etc.

As to the interpretation to be placed upon the fifth clause of the will, under the rule for early vesting, we respectfully submit that the provision in case of the death of a child or children, leaving issue as mentioned, which is a question, however, that can never arise, is wholly substitutionary; and is an event, if it had occurred or could it occur, to be referred to the lifetime of the testator; so that if none of his children had died leaving children at the date of the decease of the testator, the shares of the children would have all vested and the interest of a child of the testator dying subsequently could not be divested or defeated.

O'Brien *v.* Dougherty, 1 App. D. C. 148.
Hammett *v.* Hammett, 43 Md. 307.
Dorsey *v.* Dorsey, 9 Md. 40.
Larmour *v.* Rich, 71 Md. 370.
Meyer *v.* Eisler, 29 Md. 28.

Brown *v.* Kenyon, 3 Madd. 410.
Brown *v.* Fairfax, 60 Md. 61.
Brittain *v.* Carson, 46 Md. 186.
Crisp *v.* Crisp, 61 Md. 152.
Donnell *v.* Reid, 71 Md. 189.
Baily *v.* Love, 67 Md. 592.
Mercantile Trust Co. *v.* Brown, 71 Md. 168.

In the case of Meyer *v.* Eisler, the Maryland Court of Appeals said: "The testator having given them (his children), by the first words, a fee-simple estate, it is not a fair presumption to suppose that he intended to reduce that estate should one or both be alive when the contingency happened. So that upon either view in this case, as all the children are alive, the supposed limitation to the grandchild is defeated."

We refer to additional authorities—

Edwards *v.* Edwards, 15 Beav. 361–6.

Tested by Sir John Romilly's method, our contention must be correct.

It is supported by Lord Brougham's decision in Home *v.* Pillans, 2 M. & K., page 23.

Lord Brougham says it may thus be stated as a general proposition that where the bequest over is, in case of the legatee's death, and no other reference can be made, the period taken is the life of the testator. The rationale is found on page 26. "In that case (dying, &c.)" they, the children, take their mother's interest, because she did not live until it vested in her, and here the grandchild could only take because of a parent's death.

In Slade *v.* Milnor, 4 Mad. 144, Sir John Leach said that the interest of the devisee is not limited to his life, &c.

Rogers *v.* Rogers, 7 Weekly Rep. Ch. 541.
Abell *v.* Abell, 75 Md. 56.

Thirdly. Where an estate is given to trustees, "their heirs and assigns" in trust for others indefinitely, the latter take an estate in fee.

The case of Moore *v.* Claghorn, 10 Beav. 423, has recently been cited with approval in the highest court of this District. In that case there were three natural children named as beneficiaries in a trust devise to "trustees, their heirs and assigns forever," but the use declared was to apply the rents, etc., to the children, without words of limitation; and it was contended on the one hand before Lord Langdale, M. R., by counsel, that the children took equitable estates in fee as joint tenants. On the other hand it was argued for the heirs of the testator that the legal estate was in the trustees only to apply the rents during minority; that the children took life estates only, there being no words of limitation, "*and no use of the word 'estate,'*" and that, therefore, the reversion belonged to the heirs of the testator as a resulting trust. Lord Langdale (affirmed by Lord Cottenham) held that "*By the devise to the trustees, their heirs and assigns forever, the whole estate passed to them; but the testator declared that the gift was upon trust* and for benefit of three boys. *Everything, therefore, which the trustees took* was given to them in trust for the use and benefit of the three boys. I think, therefore, there is no resulting trust to the testator or his heirs."

This rule was recognized and enunciated in the Court of Appeals of the District of Columbia, in the case of Dengel *v.* Brown, Ch. J. Alvey delivering the court's judgment.

1 App. D. C. 423.

That was the case of a deed, and the rule does not apply to deeds. The cases are parallel in this instance, however. And Pollock, C. B., recognized and applied the rule, hold-

ing in Tatham *v.* Vernon, 29 Beav. 604, that, subject to the wife's interest, the children took the estate absolutely.

Knight *v.* Selby, 3 Scott N. R. 409.

We may venture in this connection to remind the court that the general intent will always prevail over a particular one. And the general intent here undoubtedly may be ascribed of providing for children qualified only by an anxiety for *their* welfare, with no other object expressed. The expectation of property becoming more valuable for them was obviously subordinate to the chief and leading motive and becomes necessarily a minor consideration, incapable of defeating their estate.

The Duty of Appellant to Bring this Suit.

With such uncertainty as to the meaning and effect of the will, it is impossible that its judicial construction should not have been required; and the will was peculiarly in the hands of Dr. Wm. May to ask for that construction. This, however, from a general indisposition to go into court, he refrained from doing until nearly a year from the commencement of his duties.

By this time, as the record shows, he had been subjected to almost endless requirements and complaints, which are there detailed, and he was advised to place himself under the protection of the court. Objections to his course were made, with no recognition, by Mrs. May or the others in interest, of his lawful right to the superior control of the estate. Indeed it was ignored. He was not even admitted by herself or the other devisees to be invested with, or to possess, the same authority. She claimed the principal authority. (See her answers, letters, and evidence.) It was denied by all the other beneficiaries that he was anything but a mere agent of Mrs. May. And, therefore, when he

learned from counsel that in reality the prepondering degree of power and authority was largely entrusted to him; finding, indeed, that by the terms of the codicil an unusual and peculiar accumulation of all the active powers, attaching to the trust, had been conferred upon him exclusively, he proceeded at once to bring the matter and will under the jurisdiction and supervision of the court.

That the appellant should have adopted this course, as is readily to be perceived, very greatly tended to increase the dissatisfaction he had previously incurred in the feelings of the rest of the family. It is, we think, apparent that, from antecedent family dissensions of an exceedingly unpleasant character, there was little, if any, disposition manifested to give Dr. Wm. May a fair trial and treatment. He was entitled to it. But it appears that the parties were, from the first few weeks of his trusteeship, anxious to exclude him from the trust. But we may call attention here to the fact that the act of the appellant in filing the bill intensified the bitter feelings entertained by the defendants towards him. To such a height has this angry sentiment risen against him, as is easy to see, that from an indisposition to acquiesce in his authority and an eagerness to seize upon and magnify the pettiest incident, no sooner had he invoked the court's protection and indemnity, than their indignation was so increased and inflamed that they use the most abusive terms against him for having done so. They speak of it as "outrageous," "hostile" litigation, "this disgusting litigation." And in the answers declare "that his misconduct has culminated in his singly bringing suit against his brothers and sisters"!

But Dr. May did not follow the suggestions or inclination of his own opinions solely.

The appellant states (Record, page 270), "I consulted with Mr. Selden"—this was some time after Mrs. May had

called in Col. Totten—"and by his direction wrote my mother a letter stating his interpretation of the will, which was that the management of the real estate was given to me absolutely." "She objected to everything" (Record, page 270), and further, that Mrs. Randolph, his sister, wrote to him, from New York, that Mr. Elihu Root, her counsel, had said there had been no disposition whatever of the fee; or, in other words, Dr. May had died intestate of the corpus of the estate, and that it was a very important thing to find out where the fee was. He says, too, that Mr. Dan'l T. Rollins, an eminent practitioner, of New York, was next consulted by him, and that there was an utter intestacy, and that the fee was vested in the children after the termination of the trust, which he thought was at the death of Mrs. May. "He advised me to file a bill and get the court to construe it, and state where the fee was"—"I then," says the appellant, "consulted Mr. Ashford here." He advised me to the same effect. (See his letter, Record, page 324.) He, too, said it was a case for construction. I then consulted Mr. Norris and Judge Gilmor, and they coincided in the same opinion. The result was that he employed these gentlemen, and they filed the bill in this suit as his solicitors.

The propriety of this course scarcely needs anything beyond the production of the will itself for his vindication; and of course he could not act without counsel and solicitors.

Hill on Trustees, pages 540, 542, 570.
2 Story Eq. Jur. § 1267.

"It is not an easy thing," says this author, "in a great variety of cases to say what the precise duty of a trustee is, and therefore it often becomes indispensable for him, be-

fore he acts, to seek the aid and direction of a court of equity."

And in Jones *v.* Stockett, 2 Bland, ch. 425:

"It has been long and well settled that in all cases where property has been vested in a trustee, or placed in his hands, *or put under his* control for the benefit of any * * * although such trustee may, in almost all cases, if he thinks proper, take upon himself the risk of properly executing the trust, without assistance from any quarter, yet he is not absolutely bound to do so. He may in all cases * * * ask the direction of a court of chancery; and act under the indemnity its decree * * *. And, therefore, it is that in all such cases where a trustee comes before a court as a plaintiff, or is brought before it as a defendant, and declines to execute a trust without the direction and indemnity of the court, he is held to be so entirely justifiable in thus seeking its protection, that he is never charged with interest or costs; and that all such losses and expenses are directed to be borne by the particular trust fund in regard to which the direction has been required."

And Justice Hagner had said: "It is quite a mistake to say the provisions of the will are easy of interpretation; on the contrary, they appear to me to be full of difficulties." (Record, page 382.)

It is also to be gathered, from his opinion, that the Justice thought the bill would have to be amended. For, although he does not expressly so rule, he intimates it in several parts of his opinion. He says: "The prayers of the original bill do not, by any means, comprehend all the important questions which have been argued," &c. (Record, 374.)

He recognizes the authority of the case of Jones *v.* Stockett, 2 Bland, ch. 425, referred to and relied on by the plaintiff's solicitors, in argument before him, but holds "that the interest of the estate and beneficiaries require the approval and confirmation by the court of the act of removal

executed by the other heirs and the widow, in December, 1892." And on page 381, Record, in his opinion, it is said: "The bill, as originally brought by William May, was peculiar in its form. It was brought by William May, *without joining his co-trustee*, or making her a defendant in her official capacity as trustee."

To these intimations of incompleteness of the suit, we respectfully call attention of the court to the 3d paragraph of the bill (Record, page 2), where, in the stating part of the bill, the allegation is made that Mrs. May was appointed executrix and trustee by the will—that was the stating part of the bill and source from which most properly her official connection might be introduced to judicial knowledge. Moreover, an order of court was taken (Record, page 41) for the very purpose of obviating any such objection. And if it is to be understood by the passage observing "that the prayers of the bill do not comprehend all the important questions" that the plaintiff, in such a proceeding, was bound to furnish, in the form of an averment, each question that might arise of doubtful nature upon instrument—was bound to furnish the precise construction which the court should ultimately be of opinion was the proper one to be placed upon it, we reply, that stating the will, we stated it to be obscure and of doubtful meaning. And enough, we maintain, was thus stated to let in any construction adopted by the court. After introducing the will, as was done, with prayers for construction, administration, supervision, direction of trustee in his course, it was the province of the court to construe. Besides, it was the trustee who came with the will to ascertain not only who had taken interests, but the duties and responsibilities which had devolved upon him. The suit is now in court to last moment of the duration of the trust, whatever that may be. The trustee's peculiar right is here rather a more delicate and difficult

one than is commonly found; and as time goes on and changes occur, it will always be competent for him to go into court with a petition, asking to be directed in any step to be taken in the performance of his duty.

Abell *v.* Abell, 75 Md. 64.

The rule of law from Perry on Trusts, section 411, requiring joinder of co-trustees, cited by Justice Hagner, presupposes the case of joint and co-equal and concurrent powers in the trustees in relation to the estate. "In law," says this writer (loc. cit.), 'there is no such person known as an acting trustee, apart from his co-trustee." But this rule, we submit, will not apply where the facts are so materially altered by an express provision conferring all the discretionary active power to one managing and acting trustee.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Solicitors for Appellants.

167-310

Office Supreme Court U. S.
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MAR 5 1897
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167-310

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 269.

WILLIAM MAY, TRUSTEE, AND IN HIS OWN RIGHT, AND AMY MAY, HIS WIFE,

Appellants,

v.

SARAH MARIA MAY, ALICE BEAVOR WEBB, AND J. BEAVOR WEBB, HER HUSBAND, ET AL.,

Appellees.

ADDITIONAL BRIEF FOR APPELLANTS.

The 6th, 14th, and 15th assignments of errors set forth in our brief heretofore filed in this court, at pages 13–15, seem to require further consideration.

I.

The 6th assignment of errors reads:

"The court erred in adjudging that all the powers and duties originally conferred upon said William May by said

will *and codicils* shall be vested in said Sarah Maria May, trustee, and William H. Dennis, co-trustee." (See decree, R. 370.)

All the vast powers of management given *exclusively* to William May, *lasting through a series of lives*, is taken out of his hands and transferred to *Mrs. May and her nominee*, thus practically making her *sole trustee* under the will and codicil. The decree provides that William May shall render possession and control of the property to *Sarah M. May and William H. Dennis.* (R. 370.)

II.

The 14th assignment of errors reads:

"The court erred in not adjudging that all the necessary costs and expenses incurred by William May, as trusteee, including necessary counsel fees, arising in conducting the original suit and in defending the cross-bill, both in the Supreme Court of the District and in the Court of Appeals, should be paid out of the estate."

We have shown at pages 90–91 of our brief on file that it was the *duty* of William May to file the original bill for the administration of the trusts. Clearly, then, the necessary expenses and counsel fees for conducting the suit should be paid *out of the estate*, in which event he will have to bear only a just proportion of the expense; and clearly the necessary expenses and counsel fees *in all the courts* in defending the cross-bill and his title to the trusteeship should be paid out of the estate.

It is stated in the brief of appellees that there are judgments against William May. There are judgments against him, amounting in the aggregate, at this time, to less than

$1,200. And we know why these judgments exist. Every cent of his income has been required for several years to meet the large outlays necessary to conduct the original suit and to defend the cross-suit. His interest in his father's estate is worth at least $40,000 if it remains in his hands. Every outlay in this expensive litigation, amounting to several thousand dollars, has been paid out of his own means, except $1,000 paid to his counsel, Messrs. Gilmor and Norris, yet the decree even requires that he should refund this sum. It is difficult to point out the injury that will be wrought if the decree affirmed by the Court of Appeals is carried into execution.

III.

The 15th assignment of errors reads:

"The court erred in adjudging that the heirs of the testator, other than William May, with the concurrence of Sarah M. May, proceeded rightfully in removing, *by their unanimous resolution*, William May from the trusteeship; whereas the resolution of November 25, 1892, was not signed by Frederick May, or by his authority."

We have pointed out at pages 56–58 of our brief on file how Frederick May executed a *limited* power of attorney to his mother on the 2d of July, 1891 (R. 239), when he was in Chile, South America, and how this power had been grossly perverted from its scope and purposes, and made an instrument to effect the removal of William May on the 25th of November, 1892. (R. 34–36.) Frederick May testifies he never had any idea it was to be used to effect the removal of his brother. (R. 196.)

The power of removal given to Frederick May by the codicil was *a personal confidence reposed in the donee*, and in no event could it be delegated to his mother, and his at-

tempted ratification of her act by the paper dated May 8, 1893, was a nullity. (R. 72.)

There has therefore been no removal by him.

Chance on Powers, 699.
1 Sugden on Powers, 266.
2 Washb. Real Prop., *321.
Perry on Trusts, sects. 287, 289.
Note to May *v.* Frazee, 14 Am. Dec. 170.

W. D. DAVIDGE,
For Appellants.

The following proposition is laid down in the Am. & Eng. Enc. of Law, vol. 18, p. 968:

"It follows from the idea of a *personal confidence reposed in the donee* that such a power cannot be delegated without an express provision to that effect in the instrument creating it."

And a large number of authorities are cited in support of the proposition, among which are:

Shelton *v.* Homer, 5 Met. (Mass.) 462;
Brickencamp *v.* Rees, 69 Mo. 426;
Topham *v.* Portland, 32 Law of Ch. 257.

In a work just issued in New York, Chaplin on Express Trusts and Powers, it is said:

"A delegated power is an authority which one person transfers to another, and which, in some cases, that other cannot further transfer. *Some powers are inherently incapable of delegation.* Crooke *v.* County of Kings, 97 N. Y. 421. The distinction between such as may, and such as may not be delegated has been said by Earl, J., to depend on the presence or absence of the element of *personal discretion vested in the first donee*, citing many authorities: Crooke *v.* County of Kings, 97 N. Y. 421; Coleman *v.* Beach, 97 N. Y. 545."

Where there are two or more donees and the power is *discretionary*, all must act *personally*.

Whitlock *v.* Washburn, 62 Hun. 369.

In 1 Sugden on Powers, 213, it is said:

"Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a *personal trust and confidence in the donee of it*, to exercise his own judgment and discretion, he can-

not refer the power to the execution of another, for *delegatus non protest delegare.*"

The effect of the removal was to take the *legal title* out of William May, and lodge it in the substituted trustee Dennis.

The doctrine of Sugden is sustained by the following cases:

Berger *v.* Duff, 4 John. Ch. 368;
Hawley *v.* James, 5 Paige, 318;
Alexander *v.* Alexander, 2 Ves. 642;
Saunders *v.* Webber, 39 Cal. 287.

Of course, if Frederick May could not *delegate* the power of removal to his mother, he could not afterwards *ratify* her act, and the paper set out at page 72 of the record is simply a *ratification.* The act to be ratified must be voidable merely, and not absolutely void. *A principal cannot ratify an act which he could not have authorized in the first instance.*

Richardson *v.* Payne, 114 Mass. 429.
Sceery *v.* Springfield, 112 Mass. 512.
Armitage *v.* Widoe, 36 Mich. 124.
De Cuir *v.* Le Jeune, 15 La. Ann. 569.
Harrison *v* McHenry, 9 Ga. 164.
O'Connor *v.* Arnold, 53 Ind. 203.
Ashbury, etc., Co. *v.* Riche L. R., 7 H. L. 653.

The instrument of ratification (R. 72) is dated *May* 8, 1893, and the cross-bill was filed *March* 7, 1893 (R. 48), so that at the time the cross-suit was commenced *no cause of action* could possibly have existed in favor of the beneficiaries and the ratification in no event could be of any avail. The cross-bill is an *original suit.* Mr. Story says that in England a cross-bill is so far a distinct and independent suit

that it need not be filed *in the same court* in which the original bill is filed. (Story on Eq. Pl., sect. 400.)

IV.

The *cause* of the removal will be inquired into by the court, notwithstanding the beneficiaries may have thought it sufficient.

By their cross-bill they invoke the aid of the court *to carry into effect and execution their resolution of removal.* The court will only aid them when they show good and sufficient cause for their act. If their act was unjust or oppressive, surely the court will not aid them.

In People *v.* The Mayor, 19 Hun. (N. Y.) 441, the court say:

"The power to remove a person from office 'for cause' means that a reason must exist which is personal to the individual sought to be removed, which *the law*, and a sound public opinion, will recognize as a good cause for his no longer occupying the place."

In Haight *v.* Love, 39 N. J. L. 14, it is held that the power to remove an officer "for cause" can be exerted only for *just* cause, *and after the officer has had an opportunity for defence.* "Such has been the well-settled law since the resolutions in Bagg's case, 11 Rep. 93, corrected and so established by Lord Mansfield's opinion in Rex *v.* Richardson, 1 Burr. 517."

V.

The original bill is an *administration bill.* (R. 1–4.) The removal having been made *pending the suit, without leave of the court*, is a nullity.

Mr. Perry says:

"When a suit is already pending in court for the administration of the trust, the donees of the power to appoint cannot exercise it without first obtaining the court's approval of the person proposed."

Sect. 293, citing:

Millard *v.* Eyre, 2 Ves. Jr. 94.
Webb *v.* Shaftesbury, 7 Ves. 480.
Peatfield *v.* Benn, 17 Beav. 552.
Middleton *v.* Reay, 7 Hare, 106.

VI.

As to Jurisdiction.

The original bill alleges that Mrs. May has, since the death of the testator, and against complainant's objection, claimed and demanded one-third of the income without deducting interest on the mortgages, which interest amounts to $1,600 per annum (R. 3); and the court adjudged that she is entitled to receive for life one-third of the income, without her share of the income being diminished by deducting any interest heretofore paid or hereafter to be paid upon the debts and mortgages. (R. 371.) The mortgages at the testator's death amounted to $32,000; thus giving her $400 a year from the testator's death. The bill also requests the construction of the will, and that construction would determine whether William May had a fee simple to one-sixth or a life estate. The real estate is worth at least $250,000.

The cross-bill alleges that the income from rents collected is from $1,200 to $1,400 each month (R. 50), and a schedule of part of the real estate is annexed to the cross-bill showing the monthly rentals (R. 55). The rentals were, when the cross-bill was filed, more than $12,000 a year, and

William May's commissions, under the codicil, five per cent. of the rent collected, making more than $600 a year, and he had, under the *will*, a *life interest* in these commissions, making his interest in the commissions worth more than $10,000. He was in his 45th year when his testimony was taken (R. 284).

Independently of these facts, the court had jurisdiction.

Kenaday *v.* Edwards, 134 U. S. 117;
U. S. *v.* Addison, 6 Wall. 297;
Smith *v.* Whitney, 116 U. S. 167.

W. D. DAVIDGE,
For Appellants.

167-310

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JAMES H. McKENNEY,
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Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEES.

ENOCH TOTTEN,
Attorney for Appellees.
WM. HENRY DENNIS,
Of and for the Appellees.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

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BRIEF FOR APPELLEES.

The one important question involved in this appeal is the rightfulness of the removal of William May from his position as co-trustee, to which he was appointed by a codicil to his father's will.

Such removal is distinctly authorized in said codicil. (Rec., p. 8.) It was effected by a unanimous vote of his mother, as co-trustee, and five beneficiaries, his sisters

and brother (34, 35, 36). He complained to the equity court, and their action was fully sustained (374). He then appealed to the Court of Appeals, and the decision was still more emphatically affirmed. (5 App. Cas. D. C. 552.) After all this, his appeal to this court would appear to be taken merely for delay.

Statement of the Case.

Dr. John Frederick May, an aged and well-known resident of the District of Columbia, died May 1, 1891.

He left three testamentary papers:

Will, dated February 4, 1890.

First codicil, dated March 27, 1891.

Second codicil, dated April 23, 1891.

These were all admitted to probate (4 to 10, also 324 to 330), and the widow, Mrs. Sarah Maria May, qualified as sole executrix.

He left six children, all adults, and all now living, namely:

William May (married, but has no children).

Edith Sybil Randolph (now Mrs. William C. Whitney).

Alice Beavor Webb (wife of J. Beavor Webb).

Caroline Kane Wright (married).

Julia May (unmarried).

Frederic May (unmarried).

Each of the three married daughters has children, minors, and they are made parties to this suit.

The property left by testator consists chiefly of valuable improved real estate in the city of Washington, including a half interest in the May Building, at 7th and E streets N.W., the other half interest in which belongs to the widow and children of his deceased brother, Henry May, of Baltimore, Md. (175, 278). There is a house

in New York city, No. 21 W. 19th street, which Mrs. S. M. May claims as hers (128), which claim is conceded by all her children except William May. That house is subject to a mortgage to one Archibald Gracie King to secure the personal bond of Dr. J. F. May for $12,500 (247 to 253), on which the estate has been paying the interest ever since his death. For some time after testator's death, the rent of this house was collected by William May, although by the laws of New York the trusts created by the will are void there (271) under a statute against perpetuities.

For some time before testator's death William May had been acting as his agent in collecting rents, and during testator's last illness William May began very extensive work in remodelling house No. 629 E street N.W. (112, 123), claiming that he was orally authorized to do so.

Promptly after testator's death Wm. May applied to various counsel in this city and elsewhere, to learn the fullest extent of his own rights and powers under the will and codicils (257, 275, 276, 289; see also 119, 324, etc.). At the same time, though he had a contemptuous opinion of his mother's mental and business qualifications (175, 257), he was strongly urging her, as executrix and trustee, *not* to employ or consult counsel (see his letters to her, 332, 333, 334). His object seemed to be to ignore her in the business of the estate (116).

One result, at least, of Wm. May's prompt anxiety about his own interests was unfortunate in its effects on the peace of the family. He discovered or was advised that in case of his death during the continuance of the trust, it was very probable that his wife, if surviving him, would not be entitled to any share of the estate or income, and he would not be able to dispose of any share by his own will or deed (257). As before stated, he has no children of his own to succeed to his share.

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On May 14, 1891, *two weeks after his father's death*, he called on his mother with a project for amending his father's will in this respect, by agreement of the devisees. His mother declined to enter into the arrangement, because (1) it probably departed from testator's intentions, and (2) no emergency had arisen requiring such action.

Wm. May's narrative of this painful interview is found on pages 256–257; his mother's, on pages 112, 119, and again on pages 214–215. From his own admissions that he thought her remarks "very unjust," that he became "excited," and that this was "how that trouble arose," it is plain enough that ill-feeling on his part was strongly aroused by his failing to have his own way in this project, which, with other causes which were soon superadded, made it insupportable to Mrs. May to talk with her son *on business matters* (151–152, 169, 83). Her affection towards him as a mother continues (119, 138). There is no basis for the insinuations at some places in the record, in questions of counsel, etc., that she is "angry" or unnatural in her feelings towards him as her son.

His own counsel admitted that William May's manner is "domineering" (113).

Among the next complications which arose were those about necessary repairs to the old house, No. 2022 G street N.W., in which Mrs. May resides, and which Wm. May has shown himself very reluctant to repair, although positively directed to do so by the first codicil (110, 256). In regard to the bill of one Quinter, a plumber, in 1891, Wm. May's version (257, 258) is wholly contradicted by his mother (112–113, 215–216) and by Quinter (211–212).

Another trouble was Wm. May's failure to pay to his mother, during some months after his father's death, any of the income intended by his father for her comfortable support (110, 156, 263), on the excuse that she had ques-

tioned the form of the check which he first tendered to her (262, 219). He has persisted in this tardiness in paying her thirds or income (218).

Over and above this was the question of the chronic irregularities in Wm. May's monthly accounts, required of him by the first codicil (7). In his first accounting to Mrs. May he took credit for an item of $1,174.60, which really represented a past and gone settlement with his father, made before the latter's death. The effect of this duplicate charge, if undetected, would have been to put $1,174.60 in Wm. May's pocket, at a time when he very sorely needed it (172, 369). This matter is discussed at great length in the record (114, 115, 117, etc.). Appellees contend that, even if not intentional, it showed, especially in connection with other wrong figures in Wm. May's accounts, gross incapacity for one of the most important duties of a trustee, viz., correct accounting. There were also two checks altered in date and amount before being used as vouchers (126, 127, 204, 207), duplicated credits, omissions, and erroneous charges. Some, not all, of these are small in amount; but, as Mrs. May aptly remarked, "Straws show which way the wind blows" (138).

As one example of his inaccuracy, see the five checks he drew, October 6, 1893 (107, 108), to the order of his brother and sisters, which, if endorsed by them, would have made each one of the *five* absurdly receipt for "my *one-third* interest from net collections from estate of J. F. May." Wm. May seems to feel aggrieved because these blundering checks were returned to him unaccepted (93).

Passing over many intermediate details, it may be said that the widow and children, other than Wm. May, and their counsel labored for a long time to find some way to adjust the difficulties and get along with him as the co-trustee (162). The history of their efforts is narrated in the pleadings and testimony (237–238, etc.).

After nearly a year of struggle to get the "monthly accounts" properly explained and adjusted by Wm. May, counsel for Mrs. S. M. May served upon him formal exceptions to those accounts (238). To these he replied by letter, April 25, 1892, that he would "answer them in detail in a few days," and hoped that his "explanation" would be "satisfactory" (335–336).

This brings us to the

FILING OF THIS SUIT.

So far from any "explanation" of the accounts, as promised by him, Wm. May, on May 2, 1892, without extending the courtesy of any previous notice to the defendants or their counsel (as would have been natural in a "friendly" suit), and without in any way consulting Mrs. S. M. May, the senior trustee (381), filed his bill of complaint in this cause (1–11) bearing marks of haste in its preparation. He procured writs of subpœna to be issued and served on his mother and sisters in person, though he knew they had counsel (153). Some of the peculiarities of this bill are commented on by the learned justice who held the equity court, in his carefully written opinion (381–382). Three amendments had to be made to it, to bring in necessary parties (39, 40, 76).

Answers were filed by the defendants, resident and non-resident, July 5, 1892, and then this case was allowed by William May to be at a standstill for about *six months*, while he pursued his own independent course as co-trustee, serenely disregarding any objections or protests on the part of Mrs. May as trustee (118, 276–277) on the ground that he had thrown the whole case into chancery. This delay, indeed, seemed to be his object in filing the suit.

Wearied out at last, and apprehending that matters would go from bad to worse (49), Mrs. S. M. May and her five other children decided unanimously to use the power of removal given them by the first codicil. The instrument they executed for this purpose bears date November 25, 1892 (34–37), and was served upon Wm. May December 29, 1892 (34).

Thereupon, notwithstanding his former alleged dislike for lawyers and litigation (238, 333, 335), Wm. May hurried into court again, with a vehement petition (29), charging his mother and family with bad faith, "invidious motives," etc., etc., and obtained a temporary restraining order against his removal (38, 41–42). These appellees afterwards applied for a receiver, which was denied, but without prejudice, and Wm. May was required by the court to give bond in $10,000 (74, 75) for his past as well as future actions as co-trustee.

He took $1,000 from the current income of the estate, *including his mother's thirds*, on which she depends for her comfort and support, to pay his counsel for these proceedings (61, 123, 155), without any leave of court.

Appellees then filed a cross-bill to effect the removal of Wm. May as co-trustee (48), which he answered (59), as he had often threatened to do (167, 222–223), by bringing in a quantity of most scandalous and impertinent matter (65, 163).

Issue was joined and a mass of testimony and exhibits introduced.

It is to be noted that his *mother*, *brother*, and *all four sisters* appeared and testified *against* William May, including Mrs. Randolph (now Whitney), who had been at first favorable to him, but was alienated by his conduct in the trust (171, 369). They were cross-examined at great length by his counsel (which largely and uselessly

increased the bulk of the depositions), but were not shaken in their statements.

The *only* witness for Wm. May on really material points was himself. His other witnesses were mainly as to his general reputation, or as to family history, mostly irrelevant to this case.

The depositions were taken in the following order: First, formal proof for William May under the original bill (88–109); second, proof for appellees, under their answers and cross-bill (109–210, 78–86); third, testimony for William May in rebuttal (254–368), and, fourth, further testimony for appellees in sur-rebuttal and under their cross-bill (211–239).

The case was argued by counsel, and thoroughly examined by the equity court, and an opinion (374) and decree (369) rendered, substantially sustaining the positions taken by the appellees and overruling those taken by appellant.

Wm. May thereupon appealed to the Court of Appeals of the District of Columbia, which carefully examined the case, and not only *affirmed* the decree below in all respects, but in its opinion (5 App. Cas. D. C. 552, Rec., p. 386) went further than the court below in sustaining the plenary power of the appellees to remove Wm. May as trustee, for *cause considered sufficient by the widow and children of the testator*, as provided in the first codicil to the will.

Wm. May was then so imprudent as to apply to the Court of Appeals to allow him his costs upon the appeal, although defeated. This gave occasion for the Court of Appeals to render a more scathing opinion (395, 396), saying, *inter alia:*

"No exigency had arisen for the institution of the suit. The good faith of the appellant in filing the bill has been

seriously questioned. * * * to allow the appellant his costs now would be substantially to charge the appellees with the cost of doing what we have held *they were fully justified in doing* and which the appellant *was not justified in resisting.*"

Upon its being shown that there are a number of unsatisfied judgments against Wm. May personally (398, 399), his bond on appeal to this court was fixed at $25,000.

ARGUMENT FOR APPELLEES.

The original bill was filed for the alleged purpose of getting a "construction" of the will and codicils, and administering the trust.

The cross-bill was filed to effect the removal of William May as co-trustee.

Both the courts below rightfully treated the question of removal as paramount. As pointed out by the equity court (374), if Wm. May is removed, no other relief can be given appropriately in the pending suit, at least until it is recast to suit the changed conditions thus created. This is so, because it is distinctively a suit brought by him as "co-trustee," and if he loses that character, the suit to that extent abates.

Moreover, as remarked by the Court of Appeals (390):

"It does not appear that the court below has refused to construe the will, but has regarded it as premature so to do, before any exigency has arisen for such construction. And in this view we concur. It does not seem to us that the construction of the will is of any present practical importance, or that it is required until it becomes necessary to take some action under the will and the action to be taken is rendered doubtful by the obscurity of the will."

Wm. May apparently desires the courts to advise him whether he now has a fee or a life estate in the property, and also whether the estate can be divided after the death of the widow, Mrs. May, notwithstanding the directions of the will. Both of these are abstract questions, not having reference to any present relief to be administered by the court.

In nothing have courts been more emphatic than in declaring that they will not hear merely moot questions, nor give opinions on hypothetical cases that may never happen in fact.

Thus, in the present case, it is possible that the widow may survive all the children of the testator; or, on the other hand, Wm. May may be the last survivor of the family.

"It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, or uncertain." 3 Pomeroy's Eq., sec. 1157, citing Bush. Eq. 5, 148; 12 R. I. 31.

Minot *v.* Taylor, 129 Mass. 160.
Heald *v.* Heald, 56 Md. 300.

The subject of the construction of the will and codicils will be referred to again in this brief. It is evident that any assignment of error based upon the action or non-action of the court in this regard is not well founded.

1.

REMOVAL OF THE CO-TRUSTEE.

These appellees contended in the equity court that, under the first codicil, the widow and children of Dr. J. F. May

are vested with power to remove Wm. May as co-trustee, for such "cause" as they themselves unanimously resolve to be "good and sufficient." The equity court took the view that it must itself consider the question of sufficient cause; and, in pursuance of the court's conservative desire to "forbear from adding fuel to the flames" (375), it did not adjudge that Wm. May was morally delinquent, though criticising his mistakes (381).

The Court of Appeals, as already stated, held that it could only examine whether the power had been abused (391), and strongly declared that it had been properly used.

While the practical result is the same, namely, the removal of the co-trustee, and while the reasons given by the court below amply sustain its decree, appellants submit here their own views of the case.

The "first codicil" was made in testator's last illness, about five weeks before his death, and changed the settled plan of his will, elaborately drawn a year before. He evidently had misgivings about the wisdom of the change he was making (380), and therefore inserted a proviso to guard against misconduct by Wm. May. The testator intended to dispense with the necessity of applying to a court of equity, and therefore constituted the widow and heirs a tribunal or jury to decide upon and effect the removal. The remedy was to be in their own hands.

This jury of six was certainly a favorable one for Wm. May. It included his mother, his favorite sister, Mrs. Randolph, and his only brother, with whom he says (64) he was "ever on the best of terms."

It is true the words "good and sufficient cause" are used by testator; but he cannot have meant that a court must first decide as to the sufficiency of the "cause," for, in that view, the whole provision, so carefully inserted by

him, becomes idle and useless. Any ONE of the *cestuis que trustent*, without any such clause in the codicil, could get the court to remove the co-trustee for "good and sufficient cause" of that sort.

The requirements of "concurrence" of the wife, and "*unanimous* resolution" of the other heirs, strongly establish that their action was to be effective in itself. The words "good and sufficient cause," occurring *earlier* in the sentence, are to be reconciled with what comes later by regarding them as only precatory, cautionary, or directory.

In *Cumner* v. *Butts* (40 Mich. 322) a contract provided that it might, on sixty days' notice, be revoked by either party, for "good cause." It was held that the words "good cause" could not be reduced to legal certainty, and that any revocation in good faith was sufficient.

The numerous reported cases upon the question of removing *public* officers "for cause" turn on considerations of public policy or political law, and are not applicable to a private trustee, whose tenure of office concerns only the parties in the case.

An act of Congress in reference to the Supreme Court provided that, "on showing sufficient reason," a State should have a right to an immediate trial. It was held that the Supreme Court itself had the determination of what is sufficient reason." (*Hoge* v. *R.R. Co.*, 93 U. S. 1.)

In *Walker* v. *Brungard* (13 Sm. & Mar. 758, Miss., 1849) it was said:

"On this subject, the trust deed provides that in case the said Lewis and John F. Walker shall not be deemed suitable and sufficient to act as trustees by the said Brungard, so that he shall wish to remove them at any time before the said trust shall be fully executed and performed, or otherwise determined, it shall and may be law-

ful for said Brungard and Thomas F. Walker to nominate and appoint some other fit and proper person or persons to be a new trustee or trustees.

"The correct construction of the trust deed, in my opinion, accords to Brungard the power of removal whenever he shall deem them unsuitable to execute the trust. On his application, therefore. for that purpose, I have no difficulty in declaring it to be my duty to remove the trustees." (Per Cocke, Ch. Affirmed on appeal.)

Wm. May is claiming to act under authority derived from the codicil, and at the same time is rebelling against the part of the codicil which gives the right to remove him. This is contrary to all the principles of equity.

Peters v. *Bain*, 133 U. S. 670, 695.

Removal Pending the Suit.

That the power of removal conferred by the first codicil was not suspended by the filing of the bill in this cause is ably shown by the opinion of the equity court (375–377).

The Court of Appeals very properly held that the action of the court below on this point was not subject for review 393).

Appointment of a trustee under a power, while a suit is pending, is not contempt of court, nor is it void. (1 Perry on Trusts, sec. 293.)

The mere filing of a bill, before any decree is made, does not, of itself, affect such a power of removal.

2 Perry on Trusts, sec. 474.

Cafe v. *Brent*, 3 Hare, 249.

Neeves v. *Burrage*, 14 Q. B. 504.

The original bill contains no reference whatever to any question of removal of the co-trustee. If Wm. May

wished to bring that subject into this suit he should have mentioned it in his bill. He had warning of it, and must have had it in mind (166, 167).

Causes for Removal of Co-Trustee.

Even if the view taken by the equity court be adopted here, it is easy to show, as in its opinion (377–380), that abundant cause does exist for a change of co-trustee.

If there were no other reasons, the discordant relations between Wm. May and the *cestuis que trustent*, and more especially with the other trustee, would be sufficient.

It is evident from the whole record that this is not a mere passing disagreement, still less a quarrel fixed upon Wm. May without his fault; but it is such a breach of relations as makes the whole machinery of the trust unworkable. No copartners in any kind of business could get along without disaster with such relations as exist between Mrs. May and her son William. Several of their powers and duties require joint action (379).

Out of the great number of cases illustrating this well-settled principle comparatively a few will be here selected.

Perhaps the earliest in time is the leading case of

UVEDALE *v.* ETTRICK

(2 Chancery Cases, 130) in December, 1682. Following substantially the language of the report it is as follows:

Mr. Uvedale, the plaintiff's husband, being seized of the manors of Loverley and Monuton, the farm of Martin, worth £600 a year, and the manor of Horton, worth £500 a year, and indebted £10,000, made his will, devising the premises to be sold, and £1,500 to one child and £1,000 to two others, and after his debts and legacies paid, the surplus of the land to be conveyed to his heir. The dev-

isees which were to sell were the wife [widow], who is the plaintiff, and Ettrick, Reeves, Hurst, and Constantine. The testator died, having after his marriage mortgaged Horton [yet] so as the plaintiff was dowable of all the estate. The defendants to the bill were the four [other] trustees and the heir,—which was to have a sale made, but principally that Ettrick might be put out of the trust. The wife, *one of the trustees*, was drawn into an agreement to release her dower in the £600 a year, and to give a bond of £4,000, that if any of the children died, she would not take administration, except they all died; after which, *Ettrick turns to the plaintiff's enemy*, and divers matters are charged in the bill upon Ettrick, as if he practised to get Horton, and *to be the whole manager himself*.

Reeves, in his answer, prays to be excused in the trust; Constantine and Hurst were not willing to join with Ettrick in the trust.

At the hearing the plaintiff declared in court she was contented to accept dower in the third of Horton, and to join in the sale of the rest of the land, thereby to extinguish her dower therein, and to leave the goods in the house for the heir, so that Ettrick might be discharged in the trust. On the other side Ettrick insisted to be continued in the trust, and would attend a master from time to time to get a purchaser, and to do all reasonable acts, &c.

The plaintiff's counsel insisted, it being a joint trust, and could not now be so executed, all refusing to join with Ettrick, therefore it belonged to the court to order it.

Lord Chancellor. "I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it," and declared that, without any reflection on Ettrick, he should meddle no farther in the trust, &c. (Uvedale *v.* Ettrick, 2 Ch. Cas. 130.)

So, in Swale *v.* Swale (22 Beav. 584) the M. R. said: "The testator intended to have the assistance and discretion of three trustees; but here * * * *they do not act amicably together, their united assistance and discretion*

cannot be obtained, and the majority act alone in the administration of the trust," and he granted an application for a receivership.

In the Supreme Court of the United States, a leading case is that of McPherson *v.* Cox (96 U. S. 404), which is dwelt upon by the Court of Appeals (392). In that case it is distinctly laid down that where an "active trust," "discretionary power," and "personal intercourse" are involved, ill-feeling between trustee and *cestuis que trustent* justifies the removal of the former. In that case, even with this distinction applied in his favor, the trustee narrowly escaped removal. The Supreme Court of the District of Columbia did decree it, and in this court there was a strong dissenting opinion to that effect, by Chief Justice Waite, Justices Hunt and Harlan.

Supreme Court cases in which trustees were removed on the ground of animosity or antagonism to the *cestui que trust* are—

Cavender v. *Cavender*, 114 U. S. 464.
Irvine v. *Dunham*, 111 U. S. 327.

Story's Equity Jurisprudence (vol. 2, sec. 1288), citing *Uvedale* v. *Ettrick*, *supra*, says:

"The doctrine seems to have been carried so far by the courts as to remove a joint trustee from a trust, who wished to continue in it, without any direct or positive proof of his personal default, upon the mere ground that the other co-trustees would not act with him; for, in a case where a trust is to be executed, if the parties have become so hostile to each other that they will not act together, the very danger to the due execution of the trust, and the due disposition of the trust fund, requires such an interposition to prevent irreparable mischief."

(In New York and Pennsylvania statutes confer upon the surrogate and orphans' courts equity powers in the removal of testamentary trustees.)

"*That the relations of a trustee to his co-trustees are so unfriendly and hostile as to endanger the execution of the trust, and that the differences between them are irreconcilable, is sufficient ground for removal, without inquiry into the causes thereof.* In this case, however, other reasons for the action of the court are found to exist. All the adult beneficiaries under the will join in the request for the removal of the trustee, and have stated many facts showing that his administration has been unfortunate and improvident. He has become inimical to all the beneficiaries, except one, who has not been consulted by reason of absence, and one who is a minor. He is in open hostility to his wife, who has obtained an absolute divorce against him, and ought not to be compelled to endure him as her trustee, or to have any business relations with him respecting the estate. He has no interest in the estate except his annuity, and the remaining trustees are entirely competent to execute the trust, and they and the beneficiaries are in full harmony."

Deraismes v. *Dunham*, 22 Hun. 86.

A trustee may be removed on the petition of the *cestui que trust* (a person of mature age), and of his co-trustees, though there be nothing to effect his moral character, and it appears that he intended to discharge the duties of his office with strict fidelity.

Ex parte Morgan, 66 N. Y. 618 (no opinion given); s. c. 63 Barb. 621 (opinion given).

A trustee who wastes the trust estate in unnecessary and frivolous litigation, while unwilling to pay the needy beneficiary the portion to which she is entitled, in despite of

the plain purpose of the creator of the trust, cannot complain of his removal. (In this case there were several circumstances very similar to the pending case.)

Matter of McGillivray, 138 N. Y. 308.

A trustee who has invested trust funds in his own name, in violation of the will under which he was appointed, should, notwithstanding his subsequent return of such money, be removed as trustee, *where all the beneficiaries and his co-trustee unite in stating that the interests of the estate demand such a removal. Re* Havemeyer, 3 App. Div. 19; 38 N. Y. Supp. 292; 73 N. Y. S. R. 658.

In *Simon's Estate* (12 Pa. Co. Ct. Rep. 591, 2 Pa. Dist. R. 194, and *affirmed*, 155 Pa. St. 215) it was held that it was one of the causes for removal if the relations between co-trustees were not harmonious. So also in *Marsden's Estate* (14 Pa. Co. Ct. R. 602; 3 Pa. Dist. R. 281).

In Missouri, in *Gartside* v. *Gartside* (113 Mo. 348), where a trustee was on bad terms with his sisters, partly through his fault, and was in a position to oppress them, refused them information, etc., he was removed.

So in Massachusetts, cases worthy of special attention, and to which justice cannot be done by partially quoting, are—

Scott v. *Rand*, 118 Mass. 215.

Wilson v. *Wilson*, 145 Mass. 490.

Letterstedt v. *Broers* (9 App. Cas. 371-386) was decided in privy council in 1884, on appeal from South Africa. It is a sensible, practical, and well-considered decision, based upon Story's Equity Jurisprudence as authority, and is cited with approval in 2 Lewin on Trusts, sec. 848. It points out that trustees are made such *for the benefit of those to whom the creator of the trust has given the trust*

estate, and that hostility "grounded on the mode in which the trust has been administered" is to be considered on the question of removing the trustee. The trustee in that case was removed for that cause.

OTHER CAUSES FOR REMOVAL.

Appellees further contend that Wm. May should be removed for the reasons stated in their resolution (34-36) and cross-bill (48), which are sustained by the proofs and by the following authorities:

Matter of McGillivray, 138 N. Y. 308.

In re Smith (26 N. Y. State Reporter, 235, 237; 2 Connoly, 152), where, although a referee reported against removing a trustee, the surrogate held that alleged good faith and honesty did not excuse actual misconduct in the execution of the trust; that carelessness in collecting assets and charging herself therewith warranted removal; that concealment of rents collected warranted removal, and that making restitution did not excuse.

Drawing money from bank and then refusing to explain to a creditor, or to show his official bank book, is a sign of having misapplied trust funds (121, 294).

In re Mayer, 66 How. Pr. 106.

Incompetency or dishonesty is sufficient ground for removal.

Savage v. *Gould*, 60 How. Pr. 234.

So is refusal to pay over the income as directed.

Clemens v. *Caldwell*, 7 B. Mon. 171.

Deen v. *Cozzens*, 7 Rob. N. Y. 178.

Cavender v. *Cavender*, 114 U. S. 464.

If trustee acts adversely to interest of *cestuis que trustent.*

Dickerson v. *Smith*, 17 S. C. 289.

A trustee is bound to keep accurate accounts, and produce them when called upon.

2 Perry on Trusts, sec. 821, and cases cited.

In *Middleton* v. *Dodeswell* (13 Ves. 266), Lord Erskine remarked that it was sufficient for the appointment of a receiver (in the case of an executor), if a manifest abuse of the trust appears, not from a single act, but an *habitual and prospective course of dealing.*

A trustee should be removed when he shows a *disposition* to violate the duties of his trust, so as to endanger the trust property. (In this case, the "turbulent ambition" of the trustee was censured.)

Harper v. *Straws*, 14 B. Mon. 39, 46.

A trustee will be removed if he fails to discharge his duty and *attempts* to misappropriate the property or divert it to a use not contemplated in the creation of the trust.

Guilford *v.* Arthur, 158 Ill. 600.

Trustees for charitable purposes (a municipal corporation) were deprived of the trust for corrupt practices with the fund, &c., although they afterwards made it good.

Mayor v. *Att'y Gen.*, 7 Brown Parl. Cas. 235.

It is evident from the foregoing that courts are vigilant to guard the interests of *cestuis que trustent* by removal of trustees whenever deemed necessary, even where restitution has been made for past misconduct or the misconduct feared is mainly prospective. Any other con-

struction would often sacrifice the *cestuis que trustent* to a mistaken tenderness for the right of the trustee to hold his office, which in equity ought to be the subordinate question. A trust is not supposed to be created for the benefit of the trustee.

Facts of the Present Case.

In the court below, the appellant's counsel commented on some of the complaints against Wm. May as founded on "petty minutiæ" or "insignificant inaccuracy" in his accounts. It is difficult to go into details about figures without making an argument almost as voluminous as the record, but some points may be noted.

(*a*) *As to the duplicate charge of* $1,174.60.

We ask the court to look at this, not as an isolated fact, but in connection with the circumstances, and to observe that Wm. May, with every motive to explain it and jusify himself, really explains nothing, but only narrates verbosely the obvious facts (Record, 265–266); that the duplicate charge *was* made by him and detected by his mother. What appellees wished him to explain was whether he then had over $1,000 cash on hand belonging to the estate, *as he ought to have had*, and, if so, how he could have claimed honestly that the estate then owed him a balance (Record, 226, 227).

This mystery he has never attempted to clear up. On the other hand, if the court will scrutinize Wm. May's "monthly statement" for May, 1891 (Record, 234, 235, 236), it will perceive how hard pressed he was to make his account balance, after this item of $1,174.60 was surcharged to him, so as to avoid showing it as cash on hand. *This was the very time when he antedated a check to J. P. Franklin* for $112.50; then he credited himself with

$310.01 as "*reserved* for taxes, interest, and insurance" (an utterly illegal item), and then with "*balance* to June 1, $306.24," but did not pay any of this to his mother. He did not account for this $310.01 so "reserved" until months afterward (Record, 125). All these methods certainly did not reassure appellees as to his having the money on hand.

He was then in debt to the estate for his own house rent (369).

(*b*) *Expenditures at* 629 *E street N. W.*

Wm. May undertook to remodel this house in 1891 by days' work under his own direction. He has taken credit for nearly $5,000—over *double* the estimates and bids of contractors. No proper accounting with vouchers has ever been made for the items of this sum, though often requested and promised. Some of his alleged "vouchers" are checks drawn payable "to bearer" or receipts for lump sums. He did not produce even one witness in support of his own rather vague testimony about this expensive job of work (264). He has successfully delayed so long that he will probably claim now that he is unable from lapse of time to account for the items!

(*c*) *The check to Vitaline Horan, a nurse.*

This item was made light of by appellants in argument, because "the matter in dispute here is 60 cents." But 60 cents is 1½ per cent. on the true amount, $42. The same ratio of overcharge on $12,000 a year would be considerable. Mrs. S. M. May noticed this overcharge *because the payment to the nurse was within her personal knowledge* (Record, 127). Wm. May did not consider it so unimportant but that he took the trouble to write to Mrs. Randolph about it five months later (369). At another time he refused to talk about it and became violent and threatening (166–167), making Mrs. Randolph doubt his sanity.

With all this said about it, it is worthy of note that Wm. May has never corrected this overcharge.

(*d*) *The check for* $112.50 *to John P. Franklin.*

There is no reasonable doubt that this check was originally dated in *June*, 1891, the date afterwards carefully scraped off with a sharp knife, and "May 30th" substituted. There was motive for this. Wm. May wished to use the check as a voucher in his statement for *May*, 1891, to help offset the item of $1,174.60 with which he had been forced by his mother's vigilance to surcharge himself. His guess-work "explanation" is improbable (268). A man writing a check in May does not inadvertently date it in the month *following*. Why not simply take a new blank check? This was not numbered as one of a series (Record, 253). Why scrape and alter it so carefully?

The important point about this and the Horan check is that they show that Wm. May has no respect for the *integrity of vouchers*, upon which appellees must depend for the correctness of his accounting, for large as well as small sums. Garbling or tampering with money vouchers has always been held a serious offence. The court will observe his anxiety to get back these altered checks (Record, 127).

(*e*) *The charge of* $6.70 *for stationery.*

It is true that this item is small, but to the appellees this charging up to the estate "society" stationery for a lady's use is one of the indications of a deficient sense of propriety or scruple on the part of the co-trustee.

(*f*) *Overcharge of* $100, *as paid to one Cubell, a carpenter.*

Wm. May, in effect, refuses either to admit or deny this item, and does not know, of his own knowledge, *whether it has been corrected or not* (Record, 294). Is this sum of $100 one of the "petty minutiæ," or an "insignificant in-

accuracy"? If Wm. May does not know whether his own accounts are correct or not in a matter of $100, how can any one else believe in them?

Appellees have not gone out of their way to search for causes for the removal of the co-trustee. They have taken only his overt acts in the trust and the face of his own accounts. They have never interfered with him in his functions of renting and repairing the property, etc.; but only sought to have him render proper accounts and vouchers, and behave properly toward his mother and co-trustee.

Great merit is claimed for Wm. May as having "doubled the income of the estate" and paid off $19,500 of mortgage indebtedness.

The record (246) shows that as early as 1873, before Wm. May had any part in collecting the rents, the income was nearly as large as now. It has fluctuated, and has *declined* since Wm. May has been co-trustee (Record, 337–342).

As to the $19,500, this was paid with the *active co-operation* of Mrs. S. M. May, as executrix and trustee, who *waived her one-third* of a legacy of $10,000 in order to assist in the payment (Record, 143). Appellants have studiously avoided giving Mrs. May any credit for this generosity, or for her faithful and careful performance of her own duties as executrix and trustee, but the court will perceive these from the record. No complaint is brought against her. She has acted unselfishly and for the interests of all concerned.

Motives of the Appellees.

In the courts below it was argued for the appellants, and may be here, that the co-trustee was removed for other reasons than those which are avowed, namely:

1. That the appellees voted to remove Wm. May because he brought this suit.

This scarcely needs any refutation. The appellees did not pass the resolution removing Wm. May until *six months after this suit was begun*. They had given him strong intimation long before this suit of their belief that he had shown his unfitness to be co-trustee (Record, 166, 168).

In their answers to his bill they set forth their power to remove him and their dissatisfaction with his conduct (Record, 12). They regard his suit as unfriendly, in the light of the manner in which he brought it and has conducted it; and some of them call the ensuing litigation "disgusting," because of the use which Wm. May has made in it of family letters of the most confidential kind.

In cross-examination, the learned counsel for Wm. May used all his ingenuity to make the appellees testify that they removed Wm. May on account of this suit; but he did not succeed, because such was not the fact.

2. That appellees removed Wm. May because of some controversy in the family over nine years before.

In support of this theory, Wm. May has not hesitated to make public old family letters, including those written under the sacred seal of the matrimonial relation between his father and mother. Appellees submit that this action on his part forms in itself one of the strongest proofs that he ought not to be retained as co-trustee. It looks as if he had preserved these letters for years with the idea of some day holding them as a club over the heads of his mother and sisters, in case they questioned his acts (222).

We are reluctant to follow appellants into a discussion of these epistles, protesting, as we do, that they ought not to be in the case at all. The testator is no longer liv-

ing to explain the circumstances under which he wrote. Wm. May's letters, which called forth these from his father, are suspiciously absent. In one of his father's letters to him (Record, 344) are these significant words:

"I will *burn* your letters, instead of sending them back by mail, *as you requested*."

How is the court to know whether Wm. May was not then fomenting discord for his own purposes, possibly to further a scheme for gaining control of the estate? Why not produce his own side of the correspondence with his father?

The normal state of feeling between testator and his wife, the mother of his children, is eloquently and touchingly disclosed by his loving letter to her, dated January 9, 1873 (Record, 244–247), wherein he says:

"I have thus, my darling, tried to give you as near as I can a correct statement of income, &c. I wish I could double it, for your sake, and will try to save every way and send you all I can."

This is very different from his tone when older, and sick, and getting reports of the family from Wm. May.

How could the removal of the family to Washington affect the feelings of Mrs. Randolph and Mrs. Wright, who were married and living elsewhere, and Frederick May?

Wm. May himself testified that as soon as the family was settled in Washington in 1882, "the relations were amicable" (262). This is manifest from the will made in 1890, which *omits Wm. May altogether as trustee*, notwithstanding what the testator wrote him in 1882. It was on his death-bed, when borne down with old age and illness, that testator unfortunately made the two codicils, each of which plunged his estate into a painful litigation among the family (215).

An attempt was also made in argument below to belittle the powers and duties of Mrs. S. M. May as the senior trustee. All this is substantially answered in Justice Hagner's opinion (378, 379). Besides what is there said, the court will observe that the co-trustee *must render to Mrs. May monthly accounts*, which must be "full and *true*," and accompanied by *vouchers*, thus, by necessary implication, making her an auditing officer. Moreover, Wm. May's *separate* powers are limited to those enumerated in the first codicil. He cannot pay out money in discharge of mortgage indebtedness or in distribution of income to the beneficiaries without the active co-operation of Mrs. S. M. May. The trust is thus operated, in fact, under advice of his own counsel (290, 291, 367).

2.

Construction of the Will.

No present, practical question is raised by the pleadings under this head.

The object of the will is manifest. The testator seems to have known that the law permits an estate to be restrained from alienation during lives in being and twenty-one years thereafter, and desired to use his full power in that respect. After that he makes no attempt to restrain it, and by his silence leaves it to go according to law and the circumstances which may then exist.

The will provides as follows:

1. Entire estate is devised to wife and her heirs, in trust, "subject to" provisions of will and "for" the following "purposes." She may appoint her successor in the trust.

2. (Trusts declared.) Wife is to have one-third of net

income from rents, *clear of debts*, also one-third of personal estate, for life, also house 2022 G street northwest, for life, clear of repairs and taxes.

3. No division of estate "shall be made while any of my children are living." When mortgages are paid, rents shall be divided unto "children."

4. Provision is made for sale and remortgaging in certain cases.

5. If "children" die leaving [minor] issue, trustee is to use or accumulate income until they arrive at age, and pay accumulation to them then.

This tying up of the estate, for the objects stated, is entirely effective.

An active trust for the benefit of another person, with restraint upon alienation, is valid.

2 Jarman on Wills, *14, note 1, citing—

Nichols *v.* Eaton, 91 U. S. 716.

The widow and all the children of testator are living, as at his death. No material change has occurred in their condition or that of the estate, and there is no reason why the trust should not go along smoothly, after the substitution of a satisfactory trustee.

It may be worth noting, as an indication of the facility intended in removing the co-trustee, that Wm. May is not vested with any *estate* in the land as co-trustee. He is only to "exercise the powers" given in the will, jointly with the widow. (See codicil, p. 7.)

Thus, in *Sidebotham* v. *Watson* (11 Hare, 170), where there was a direct devise to two in trust, a subsequent appointment of these two, and a third "to be trustees and executors," was held not to make the third a joint devisee.

2 Jarman on Wills, sec. 305.

The provision for testator's grandchildren, in paragraph 5 of the will, throws light on the intended duration of the trust. It does not apply merely to children dying before the death of testator. Jarman on Wills (vol. 2, sec. 756) says that such a construction is adopted only *ex necessitate*, in the absence of any other period to which the word can be referred.

See Hilliard *v.* Kearney, Busb. Eq. 221.
Burton *v.* Konigland, 82 N. Car. 99.
Davis *v.* Parker, 79 N. Car. 271.

In this case the words may and ought to refer to any time *during the continuance of the trust*, for evidently such a provision is necessary under the intentions of testator.

But if this be true, and as *expressio unius est exclusio alterius*, the provision for children who die *leaving issue* excludes the representatives of children who leave *no issue* from any share of income. Even if we say that the shares of the heirs of testator are even now vested in them (his children), the whole *income* therefrom must nevertheless be paid to the objects of his bounty, his children and grandchildren, so long as one of his six children survives.

Even if it is said that "a devise of the rents of land is a devise of the land," we have here a "tontine" plan by which the income at any time goes jointly to the testator's surviving children, with proviso only for the benefit of his minor grandchildren.

Say that each child of testator is even now vested with the legal title to one-sixth of the ultimate reversion, yet this is rendered barren or fruitless, because the whole income is diverted in a certain channel until the death of the last surviving child. There are, as it were, joint life estates or cross-remainders in this *income* until the last child of testator dies.

QUESTIONS NOT BEFORE THE COURT.

As to the duration of the trust, whether it will end at death of widow, and whether the property can be sold by unanimous consent, defendants submit that the court will not now decide.

Future rights will not be declared.

Courts will not declare the rights of parties, except where immediate relief can be given.

Heald v. *Heald*, 56 Md. 300.

The equity court rightly declined to pass upon these questions in this suit *in its present form* (381).

3.

AS TO "ADMINISTRATION OF TRUST."

The only question of law set forth in the original bill under this head is whether Mrs. May must bear one-third of the interest on mortgage debts,—which illustrates, by the way, how very "friendly" this suit is towards her.

It is a transient question, as the mortgages are mostly paid. The other heirs wish the widow to have every benefit possible, during the few years that may remain to her. On advice of his own counsel, Wm. May acquiesced for a time, and then reclaimed the amounts he had already paid her (274–275).

The will gives the widow one-third of the net income from rents (par. 2) and, in par. 3, directs that the rents, "*with the exception of the thirds of my wife*," shall be applied to payment of all his just debts, "and especially to the cancelling of any incumbrance or mortgage."

The merely general rule, that a life tenant should keep down the interest, ought not to weigh against this *express provision*.

The interest is a *part of the debt*, and its payment a necessary step in cancelling the mortgage.

The whole will and codicils show a tender and anxious desire to provide for testator's wife, inconsistent with any such burden on her income. She is exempted by codicil from paying taxes, repairs, etc., on house 2022 G street.

Moreover, legacies to a widow are favored in the law. They are not gifts or gratuities, but her relinquishment of dower is a *valuable* consideration. (See 2 Jarman on Wills, Bigelow's ed., sec. 622, note 1, citing Pierrepont *v.* Edwards, 25 N. Y. 128; Dey *v.* Dey, 19 N. J. Eq. 137, and other cases.) See Md. act of 1798, c. 101, sub-ch. XIII, sec. 5 (Dennis, 96). She is "a purchaser for a fair consideration."

Nor will a court appraise the value of a dower right, as to whether it would be greater or less than what she accepts.

Sykes *v.* Chadwick, 18 Wall. 141.

The equity court adopted this view in its opinion (382) and decree (371), and it was affirmed (393).

Conclusion.

To force this objectionable co-trustee upon the trustee and beneficiaries in this case, after all that has happened, would be a misfortune so great that a fuller discussion has been given to the question in this brief than perhaps was necessary, after the able opinions delivered in the courts below.

We submit that the decree appealed from ought to be affirmed with costs.

ENOCH TOTTEN,
Attorney for Appellees.
WM. HENRY DENNIS,
Of and for the Appellees.